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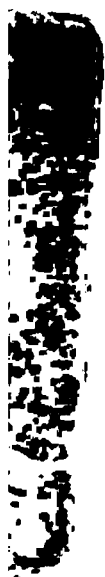
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ONTARIO WEEKLY REPORTER

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EDITOR :

WALTER E. LEAR, ESQUIRE
OF OSGOOD HALL, BARRISTER-AT-LAW.

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THE
ONTARIO WEEKLY REPORTER

VOL. 21

TORONTO, FEBRUARY 8, 1912.

No. 1

HON. MR. JUSTICE KELLY.

JANUARY 25TH, 1912.

O'DONNELL v. TOWNSHIP OF WIDDIFIELD.

Municipal Corporations — Contract for Construction of Municipal Works — Authorisation of Work by Resolution — Meeting of Council not Properly Called or Constituted — No By-law — Contract not Executed — Action for Breach of Contract Dismissed — Without Costs.

Defendant municipal council called for tenders for certain work amounting to \$20,000. Plaintiff put in a tender, which he claimed was accepted by the council, and an agreement made between them for the carrying out of the work. He brought action claiming \$10,000 damages for breach of contract and to recover \$200 for work performed.

KELLY, J., *held*, that no by-law was passed by council awarding the contract to the plaintiff or authorising the making of it. Nor was the contract an executed contract, and the defendants in no way became bound by acceptance of the benefits thereof.

That, as the plaintiff admitted that whatever work he did for defendants was done to "test them out," the action should be dismissed, but in view of the circumstances surrounding the holding of what was intended as a meeting of the township council, and of the irregularity and want of care shewn in dealing with a matter of such importance to the municipality, the dismissal of the action should be without costs.

Tried at North Bay non-jury sittings, on December 13th, 1911.

Peter White, K.C., for the plaintiff.

G. H. Kilmer, K.C., and J. M. McNamara, K.C., for the defendants.

HON. MR. JUSTICE KELLY:—By a proclamation issued by the Lieutenant-Governor of the province of Ontario in Council, dated April 7th, 1910, it was declared that certain parts therein particularly described of the township of Widdifield in the district of Nipissing, should be withdrawn from that township and be annexed to the town of North Bay, and that such withdrawal and annexation should take effect on and after January 1st, 1911.

On August 10th, 1910, a by-law was passed by the municipal council of the township of Widdifield, authorizing the expenditure of \$33,000 for the carrying out of the work of making certain permanent improvements for the purpose of opening, improving, grading, and gravelling certain streets, the opening, making, and constructing of certain storm sewers, and the constructing of certain waterworks and water-mains in that part of the township of Widdifield so to be annexed to the town of North Bay, and providing for the issue of debentures of the township for the purpose of raising these moneys.

On December 12th, 1910, an application was made to Court to quash this by-law and the application was dismissed; but on appeal the by-law was quashed by the Divisional Court on June 23rd, 1911.

Some time prior to October 15th, 1910, the council of the township proceeded to call for tenders for the construction of the storm sewers and works in connection therewith; and the plaintiff put in a tender for that work, and it is claimed that the council accepted his tender, following which what is claimed to be an agreement, dated October 15th, 1910, was made between the plaintiff and defendants the corporation of the township of Widdifield, for the carrying out of the work so tendered for by the plaintiff.

The municipal council of the township consisted of the reeve and four other members.

Prior to the opening and consideration of the tenders, there was evidently a difference of opinion amongst the members of the council as to the advisability of proceeding with the work, the reeve and two other members being in favour of it, while the other two disapproved of it.

When the time arrived for opening and considering the tenders, the reeve verbally notified three of the four councillors to attend a meeting of the council at his place of business on a certain day, on or about October 5th or 6th, 1910. The other councillor, Overholt, was not notified, the explanation given by the reeve being that at a regular meeting of the council held sometime previously, Overholt had said he would not be satisfied with what the other members of the council would do. Overholt, on the other hand, referring to his not having received the notice of the meeting, said he was opposed to the by-law and the carrying out of the

work and was disgusted, and that he only heard of the meeting two or three days after it had taken place.

No business was done at the meeting on the day for which it was so called, and it was adjourned until the following day. It does not appear certain that any particular hour was named for the adjourned meeting, one of the members, McIntosh, saying that ten o'clock was named. His account of it is that he attended at the reeve's place of business, the place named for the meeting, at 10 o'clock a.m. on the following day, that the reeve was not at home, his son stating that he had gone out to the country, that he (McIntosh) after waiting for a time, went away and returned at 12 o'clock, and finding that the reeve had not yet returned and that there was no appearance of a meeting being held, again went away, and later on went out of town.

On the afternoon of that day the reeve and two other members of the council, namely, Doyle and Irvine, met at the reeve's place of business, neither Overholt nor McIntosh being present, and decided upon accepting plaintiff's tender, the only other person present at the meeting being the township engineer.

As appears by the evidence, no by-law of the corporation was passed accepting plaintiff's tender or awarding him the contract or authorizing the making or signing of any contract with him, the only action of the council thereon being a minute as follows: "Moved by Doyle, seconded by Irvine, that D. O'Donald be awarded the contract for laying sewer." Signed "John Murphy."

The written record of what took place is of the most meagre kind, and, so far as the evidence shews, this record remained in possession of the engineer until the time of the trial, and no minute of what took place was entered in the books of the corporation, nor was the clerk of the municipality present at the meeting.

A term of the specifications of the work on which the plaintiff tendered was that "The contractor shall commence actual operations on the construction of the work within fifteen days after the signing of the contract," and before plaintiff signed the contract there was added thereto, at plaintiff's request, the following: "And satisfactory financial arrangements have been made by the corporation."

The defendants do not appear to have taken any other steps towards proceeding with the work or ordering or re-

quiring the plaintiff to do so. The plaintiff, however, of his own account did some work in December, 1910, the value of which he estimates to be about \$38 or \$40.

The evidence does not satisfy me that the meeting in question was properly called or properly constituted. All members were entitled to proper notice of the meeting and of the time and place of holding it, and it cannot be said that the manner in which this meeting was convened was in accordance with the necessary requirement in such cases. Even had it been properly convened there was wanting an essential requisite to the making of the contract with the plaintiff, in that no by-law was passed awarding the contract to the plaintiff or authorizing the making of it.

Section 325 of the Consolidated Municipal Act, 1903, provides that "The jurisdiction of every council shall be confined to the municipality which the council represents, except where authority beyond the same is expressly given, and the powers of the council shall be exercised by by-law when not otherwise authorized or provided for."

This section is in the exact words of sec. 282 of ch. 184, R. S. O. 1887, which was well considered in the case of *Waterous v. Palmerston* (1892), 21 S. C. R. 556, where it was held that a by-law is necessary in order that a municipal corporation shall make a valid contract, even where the contract is made under the seal of the corporation.

This requirement was not complied with in the case now under consideration. The transaction was one of more than usual importance to the municipality, the proposed contract contemplating an expenditure of more than \$20,000 according to the evidence both of the plaintiff and of the engineer for the township of Widdifield—a very substantial liability for a township to incur. One would have thought that the decision to make such an expenditure and to bind the municipality to an obligation of that extent was, to use the language of Mr. Justice Patterson, in *Waterous v. Palmerston*, "a matter of sufficient importance to deserve whatever amount of deliberation and care the law aims at securing by requiring the action of the council to take the form of a by-law."

Nor can it be contended that the contract was an executed contract, or that the defendants in any way became bound by acceptance of the benefits thereof. The plaintiff

admits that whatever work he did for defendants was done to "test them out."

I can come to no other conclusion than that plaintiff is not entitled to succeed, and I, therefore, dismiss his action. In view, however, of the circumstances surrounding the holding of what was intended as a meeting of the township council, and of the irregularity and want of care shewn in dealing with a matter of such importance to the municipality, the dismissal of the action is without costs.

It was contended by defendants at the trial that plaintiff's action should fail on other grounds shewn in the evidence, such as the quashing of the by-law authorizing the issue of the debentures from the proceeds of which it was intended to pay the cost of the work tendered for by plaintiff; that plaintiff was not entitled to proceed with the work except at such time and place as the engineer of the defendants, the township of Widdifield, should direct, and that the engineer did not give him any direction to so proceed; and that the defendants were bound only conditionally upon their making satisfactory financial arrangements, which they failed to make.

In view of the conclusion I have come to for the reasons given above, I have not thought it necessary to consider these contentions.

COURT OF APPEAL.

JANUARY 17TH, 1912.

RE HUNTER.

Will—Construction—Residuary Clause—Division of Residue among Children in Proportion to Legacies—Alterations in Amounts by Codicil—Second Codicil—Intention—Extent of Rule.

COURT OF APPEAL reversed judgment of Divisional Court, 18 O. W. R. 338, 24 O. L. R. 5, and declared that Henry Alfred and David John Hunter were entitled to share in the residue in the proportions that the sum of \$7,000 bears to the residue, with the consequent directions.

GARROW and MEREDITH, JJ.A., dissenting.

An appeal from a judgment of a Divisional Court, reported 19 O. W. R. 338, 24 O. L. R. 5, affirming a judgment pronounced by HON. MR. JUSTICE MIDDLETON, 18 O. W. R.

299, upon one of the several questions submitted upon originating motion as to the construction of the last will and testament of the late William Henry Hunter.

A number of questions were submitted and disposed of, but the appeal to the Divisional Court was in respect of one question only, viz., as to the respective shares or interests of two of the testator's sons, Henry Alfred Hunter and David John Hunter, in his residuary estate.

The appeal to Court of Appeal was heard by HON. SIR CHAS. MOSS, C.J.O., HON. MR. JUSTICE GARROW, HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MEREDITH and HON. MR. JUSTICE MAGEE.

E. D. Armour, K.C., and R. B. Beaumont, for the appellants.

C. R. McKeown, K.C., for the executor.

Shirley Denison, K.C., for the widow.

J. R. Meredith, for the infants.

HON. SIR CHAS. MOSS, C.J.O.:—The testator, who describes himself in the will and codicils thereto as a farmer, was evidently a man of very considerable wealth. Judging from the many parcels of land and the quantity of personal property disposed of in specie, as well as the numerous pecuniary gifts and legacies (amounting to over \$40,000) bestowed upon children, relatives and others, it is safe to say that the will and codicils disposed of an estate the value of which probably exceeded \$150,000.

It is evident that the disposition of his estate had been the subject of careful deliberation, and that his desire was to fully express his wishes and intentions in regard to the interest or share in his estate to be taken by each beneficiary named by him.

A period of more than two years elapsed between the execution of the original will and the first codicil, but the latter shews the same care, deliberation and fullness of expression.

And the final codicil, executed nearly three years after the first, displays similar characteristics. It may fairly be assumed that in the changed circumstances the testator gave full consideration and attached due weight to the position and claims of each of the beneficiaries affected by them, and

made his subsequent dispositions with all these matters before him. Neither the original will, nor his ultimate testamentary disposition of his estate appear to indicate equality of division as the governing consideration. Rather does it indicate careful consideration of all the circumstances.

It is to be borne in mind that the ultimate wishes of the testator are to be ascertained if possible by a proper construction of the language in which he has expressed them; and these wishes when so ascertained constitute his last will and testament.

In *Douglas-Menzies v. Umphelby*, [1908] A. C. 224, their Lordships of the Judicial Committee say (p. 233): "Whether a man leaves one testamentary writing or several testamentary writings, it is the aggregate or the net result that constitutes his will; or in other words the expression of his testamentary wishes. The law on a man's death finds out what are the instruments which express his last will. If some extant writing be revoked, or is inconsistent with a later testamentary writing, it is discarded. But all that survive this scrutiny form parts of the ultimate will or effective expression of his wishes about his estate. In this sense it is inaccurate to speak of a man leaving two wills; he does and can leave but one will."

In connection with these principles, it is to be borne in mind that as enacted by sec. 26 of the Wills Act, R. S. O., ch. 128—now sec. 27 of 10 Edw. VII., ch. 57—every will shall be construed with reference to the real and personal property comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appears by the will.

Further as regards the last will and testament in question here, it is not unimportant to note that the final codicil concludes with the following declaration by the testator: "In all other respects I conform my said will up to the time of the execution of this codicil what constituted the testator's will? It cannot be said that the original will did, for the testamentary desires therein expressed had been modified, altered and varied by the first codicil, and the testator's will expressed up to that time could only be gathered from the original will and the first codicil. That codicil is expressed to be a codicil to the will dated the 13th February, 1904. The final codicil is described as a codicil to the last will and testament of the testator, but makes no reference to date.

It is manifest that this codicil was intended to take effect as against preceding testamentary dispositions, whether found in the original will or in the first codicil.

In the case of *In re Fraser, Lowther v. Fraser*, [1904] 1 Ch. 726, the effect of a confirmatory clause in a codicil, as well, since the first passing of the provision contained in sec. 27 of the present Wills Act, as under the old law, is thus stated by the Court of Appeal (p. 734): "The effect is to bring the will down to the date of the codicil and effect the same disposition of the testator's estate as if the testator had at that date made a new will containing the same dispositions as the original will, but with the variations introduced by the various codicils."

For this proposition several authorities are cited, and amongst them the case of *In re Champion, Dudley v. Champion*, [1893] 1 Ch. 101, wherein North, J., says (p. 111): "The codicil makes the will take effect as if it had been executed at the date of the codicil."

What is to be ascertained in the present case is the position and rights of the appellants Henry Alfred Hunter and David John Hunter, under the residuary clause contained in what is the last will and testament of the testator as executed and declared on the 24th of March, 1909. There is only the one residuary clause, and of course, it can only become effective after all the specific devises, bequests and dispositions made by the will as a whole have been satisfied or provided for. It is not necessary to repeat the words of the residuary clause. The directions are very simple, (a) the whole residue of every nature and kind is given to the testator's children; (b) they are to share in it in proportion to the personal property "herein" (that is in the will of which this is the residuary disposition), bequeathed to his children, but (c) in calculating the proportions, the personal property bequeathed to W. H. Earl Hunter is fixed at \$2,000.

In order to ascertain the proportions in which the residuary estate are distributed, it is only necessary to find what personal property each child is entitled to receive under the bequests to them to be found in the will as it stood at the testator's death. In seeking to do so, it is, of course, proper to apply the usual rules of construction and find out what the testator has done, by ascertaining the meaning of the words he has used and the connection in which he has used them.

Where, as here, the meaning has to be ascertained by bringing down to the date of the last codicil what remains of all the preceding testamentary instruments, there does not appear to be any objection to looking at the original testamentary directions. But it cannot be a correct method of dealing with the will to accept the original dispositions as guides to the influences giving rise to changes. The fact of changes in the dispositions formerly made is *prima facie* an indication of change of intention. But as to what may have led to or induced the change of intention, unless the testator has manifested it either by express statement or very clear inference, it is unsafe to seek to enter into his mind, or speculate as to the grounds which have influenced him. All that can safely be done is to take the later directions, apply them to the earlier and ascertain the result. The observations of Fletcher Moulton, L.J., in the case of *In re Baden, Baden v. Baden*, [1907] 1 Ch. 182, though used in a dissenting judgment are weighty and well worthy of attention. He says (p. 145): "Our law gives full liberty of testamentary disposition and testators avail themselves of the liberty to the full. Courts are, therefore, treading on dangerous grounds when they leave the actual wording of the document and permit themselves to speculate on what is a probable disposition in a will."

Dealing in the light of the foregoing principles with the provisions applicable to Henry Alfred Hunter, we find that apart from the residuary clause, the only provision relating to him is a bequest included among a number of bequests which the testator desires his executors to pay as soon as convenient after his decease. The bequest is in these words: "To my son Henry Alfred Hunter I give the sum of \$2,000." Thus stood the will as to him until the execution of the first codicil which contained a direction as follows: "I hereby order and direct that the sum of \$7,000 shall be paid to my son Henry Alfred Hunter in the place and stead of the sum of \$2,000 bequeathed to him in my said will." If the testator had died while his testamentary dispositions were in this form, the amount of personal property bequeathed to Henry Alfred Hunter would beyond question be \$7,000, and the language of the residuary clause would have applied to the \$7,000 and not to the \$2,000, for the latter bequest was no longer to be found in the will.

It serves no useful purpose, and as Fletcher Moulton, L.J., observed (*supra*), it may be dangerous, to speculate as to the testator's reasons for increasing the amount of the bequest. He may have thought this sum together with the greater proportionate share under the residuary clause would place Henry Alfred on a par with his brothers and sisters, or he may have decided for reasons that appeared good to him that Henry Alfred should take a greater share than his brothers. That at all events was the expression of his will. The only operative bequest was one of \$7,000. And nothing was said or indicated to alter the residuary clause, as by the introduction of a provision resembling the restriction placed upon the proportion to be taken by W. H. Earl Hunter.

But when the testator dealt once more with Henry Alfred's interests, as we find he did in the final codicil, while he revokes the bequest of the \$7,000, that being the only one then extant, he expressly provides that the revocation of the bequest is not to apply to Henry Alfred's share of the testator's estate as set forth in the residuary clause. What at this time was Henry Alfred's share in posse in the testator's estate, reading the first codicil in connection with the residuary clause? They together formed the expression of the testator's will, which as expressed gave Henry Alfred \$7,000. Is there anything to be found in modification of that position?

Again, it is vain to speculate as to grounds or reasons. But there is nothing unreasonable in supposing that the testator deliberately concluded that the lands devised to Henry Alfred, and his share of the residuary personal estate, based on the proportion of \$7,000 as before, would be equivalent to the sum of \$7,000 cash and the share of the residuary personal estate. In other words, that the lands would be the equivalent of the \$7,000, and the proportion of the residuary estate might be left as it was under the operation of the will and first codicil. But whatever may have been his motive, he chose that Henry Alfred should remain in the same position with regard to the residue of the estate as he was when he was to receive a bequest of \$7,000 out of the personal property. That was the only bequest in Henry Alfred's favour contained in what was then the testator's will as gathered from the two papers then constituting it.

As to David John Hunter, the case appears to be even stronger. When the language of the residuary clause is ap-

plied to his case, the personal property bequeathed to him must be looked for, and that is found to be \$7,000. That is the only sum bequeathed to him, and the only other benefit he is to receive is his proportion of the residue of which the only measure is the bequest of \$7,000.

It is said that the original will indicated a scheme in the mind of the testator that each of his sons should receive personal estate to the extent of \$2,000, and the distribution of the residue in proportion to that sum, and that this scheme will be disturbed if the provisions of the codicils as respects Henry Alfred and David John Hunter are given effect to. It may be that the testator when making the dispositions contained in the original will had some such design in view, but it is evident that if he had it was based upon a view of all the provisions he had then made.

But the first codicil introduced at once a change, not only as respects David John, to whom lands had been given, but as respects Henry Alfred, to whom no lands and nothing except \$2,000 had been given by the original will.

If the testator had desired to preserve the proportions mentioned in the original will he could easily have done so by a process similar to that used in the case of W. H. Earl Hunter.

The appeal should be allowed and it should be declared that Henry Alfred and David John Hunter are entitled to share in the residue in the proportions that the sum of \$7,000 bears to the residue, with the consequent directions.

The costs of the litigation have hitherto been directed to be borne by the estate, and in view of all the circumstances it is proper to continue that direction, including the costs of this appeal—the executors' costs between solicitor and client.

HON. MR. JUSTICE GARROW (*dissenting*):—I agree with the judgment of the Divisional Court. The several questions originally involved appear to be now narrowed into one concerning the proper construction of the residuary bequest contained in the will, which is in these words:—

All the rest, residue and remainder of my estate both real and personal, not hereinbefore disposed of, I give, devise and bequeath to my children, they to share in said residue in proportion to the personal property herein bequeathed to my said children, but in calculating the said

proportions the personal property bequeathed to my son W. H. Earl Hunter is fixed at two thousand dollars.

There is no difficulty in understanding this language. It is perfectly plain and simple, as every one admits, and I am unable to see any justification or excuse for not applying it fully, exactly as it is expressed.

It was certainly not expressly revoked by anything appearing in the codicils. Nor, in my opinion, was any implied revocation or alteration effected by the circumstance so much relied on, that the testator by the codicils has varied the legacies given in the will upon which originally it was intended that the shares in the residue should be ascertained. A codicil, in the absence of express words, only varies a will to the extent that may be necessary to give full effect to the codicil. It by no means seems to follow that because the testator by a codicil substituted a larger pecuniary legacy than that given in the will he also intended to increase the legatee's share, in competition with the other legatees, in the residue.

Such a result might, of course, follow as the result of language indicating such an intention, as was apparently the case in *Re Courtauld*, 47 L. T. R. 647, where in a case in some respects not unlike this, Kay, J., found in the language of the will and codicil enough to justify him in his carefully considered opinion in reaching such a conclusion. But, from a perusal of the case, it is quite obvious that while there is a general similarity in the two cases, there are also material differences. There the testator had said in the codicil that he revoked the former legacies in question, and in substitution for and not in addition, gave the new and larger legacies "subject nevertheless to such trusts and provisions as were declared in the will . . . and in the same manner as if they were repeated." These words and particularly those which I have put in commas, Kay, J., regarded as very material. And from them and the general scope of the will, concluded that the proper construction was to read the substitution as intended to be a substitution for all purposes, including the ascertainment of the shares of the legatees in the residue. There are no words of similar purport in this case. All we find here is a bare cancellation of the former legacy, and in its "place and stead" a new and larger legacy given. So that I agree with Teetzel, J., that *Re Courtauld* is not an authority in favour of the appellant's contention.

I would dismiss the appeal.

HON. MR. JUSTICE MEREDITH (*dissenting*):—It is better, in all such cases as this, to proceed, in the first place, upon the fundamental principle, and cardinal rule of construction: that is to find out what the testator meant from the words which he has used, and that is from all the words, viewing the whole surrounding material circumstances from the testator's point of view at the time when the will was made as much as is possible; not to begin by studying other wills, and interpretations of them, but leaving that to be done thoroughly when the will in question has been first studied; if for no other reason, because there is sometimes some danger of a disposition to fit one case into another, though one may be round and the other square, too much anxiety to find a case in point, even though we may all know that it is said that there are no two blades of grass alike, and there are undoubtedly very few wills here that are quite alike—mutual wills, which would have such a tendency, never having been much in vogue in this province: and when one comes to think of it it is apparent that there must be great danger of a misfit in applying the mind of one man expressed in his will in darker ages to control the will of another made in the present day, and the more so when we cannot be sure that it is the will of the one man when really it may be the will of him or them who interpreted such will. Cases, and rules of construction, may, and indeed must be of great assistance; but they can, and must be, very dangerous guides if we forget the governing principle that it is not the meaning of some other will but is the meaning of that in question which must be learned and to which effect must be given.

We have here to deal only with the gift of the residue of the testator's sons; but if we were to close our eyes to all else that is contained in the will and codicils in question, and to the surrounding circumstances, we would run much danger of taking the road how not to construe, rather than the road how to construe, the will. It does not, however, seem to me to be necessary to refer to context, or to circumstances, to any great extent, in order to grasp the meaning of the will, and the real mind of the testator in respect of the matters here in question.

The general scheme of them, in respect of the testator's children, was first an equitable division of his lands among his sons; and it does not disprove that scheme merely be-

cause one of his sons seems, in his eyes, to have worn a coat of many colours, nor because another was not counted among those among whom the division was made: such circumstances may only the more draw attention to the equity, which was in his mind, as well as elsewhere, equality.

The next noticeable feature, in this respect, is that there was absolute equality provided for between his sons, in the pecuniary legacies given to them, and in the residuary bequest. That was I think, clearly, the reason for the limitation of his "Benjamin's" share in the residue: this son was, under the will to take other personal property than money; the other sons were not; the provision fixing the measure of the gifts of the residue was "in proportion to the personal property," not to the pecuniary legacies; so that, to put them all on quite the same footing, it was necessary to provide that the favoured son's proportion should be based upon the same sum as that of each of the others. I can find no warrant for the contention made in the 4th par. of the reasons for this appeal; on the contrary this circumstance makes against the appellants.

Under the will the son David was to get his specified share of the real estate, his equal legacy of \$2,000, and his share of the residue, if any—for the will provides for a deficit as well as for a residue—with the same complete equality.

By the first codicil, the only alteration of the will affecting this appellant, the devise to him, contained in the will, for reasons expressed in the codicil—one of them being that the testator had, after the making of the will, disposed of part of the land comprised in this devise, was revoked, and the sum of \$7,000 was bequeathed to him in "the place and stead" of the \$2,000 legacy.

It was contended, for the appellants, that a rule of construction requires that when one legacy is given as a mere substitution for another it must be held to be subject to all the incidents of the first gift; and the Divisional Court expressly recognised such a general rule; but I would much prefer to put it, in the words of the present Master of the Rolls, that "on general principles," in a simple case, the later gift is subject to the incidents of the earlier gift: it all depends upon the will of the testator to be ascertained on the fundamental principle.

The rule, as stated in the Divisional Court, would be quite too narrow an one: it could not apply to this case

because no one could say that the residuary bequest was an incident of the pecuniary legacy; it is an entirely separate gift even though its measure depends on the amount of the pecuniary legacy.

One can readily suggest many cases in which the character of the gift in the first place would govern it in the second place, as well as many in which it would not, but all, I think, simply because the testator's intention sufficiently appears.

The broader way of putting it would include the appellants' cases: if, by the cardinal rule of construction, it can be found that that which they contend for was that which the testator meant, effect should be given to their contention.

But to adopt a somewhat hackneyed mode of expression there are substitutions and substitutions; and though it may not be "as plain as the nose on your face"—in some instances—I cannot think that anyone can reasonably doubt that the additional \$5,000 was given in "substitution" for the land devised to David in the will, and by the codicil taken away from him in the revocation of that devise. Land which in no case was to affect the amount of the residuary bequest: and I can imagine no good reason for holding, and I cannot believe, dealing with the case on the fundamental principle, that it was the intention of the testator that the \$5,000, thus given was to effect the exactly even division of the residue as far as the sons were concerned.

For some reason, not in any way made apparent, the other appellant—the son Henry—was devised nothing by the will; whether it was because he was the opposite of Benjamin, or whatever the reason may have been, we get no aid from it; but when the first codicil was made that was repaired; immediately after readjusting David as I have mentioned, the testator gave to Henry, in the same words, exactly the same as that which was thus given to David. All the circumstances point unerringly to equality; the taking away of the land from David was made good by the \$5,000; and the lack of a devise to Henry was made good by the \$5,000 more coming to him under this codicil. I cannot think that the most contentious mind would contend that, by this codicil, these two sons were not to be put upon an absolute equality; and so, if I am right as to either, I am right as to both.

But that is not all; in the second codicil Henry, at last, is given land; but of course with a withdrawal of corresponding money gifts; as the codicil expresses it, the lands are given "in lieu" of the bequest: adding further evidence to the already very evident scheme of the testator of equality as to lands and equality as to money; the residue to be affected only by the even shares of the moneys, as far as the sons were concerned, the lands, and that which stood in place of lands, to have no effect upon it.

The last codicil reserves Henry's right to his share under the residuary bequest contained in "my said will"; the "said" will being "the last will and testament of me" the testator. The reference to the residuary bequest is of course a reference to the original will; the only residuary bequest of the testator is contained in that document. The words "my said will" may of course have been employed by the testator to describe the will itself in one place, and the will and codicil in another; such inaccuracies, from the strictly accurate point of view, are by no means unknown. I would not grasp at literary straws where the outstanding and controlling features are so plain, and in documents not overflowing with grammatical accuracy or literary elegance. If these lesser things were alone to be considered it might follow that no judgment could be given in this case for want of grammatical accuracy. I do not think that these words "my said will," contained in the last codicil, help, or hurt, either side very much.

Nor do I put much weight upon the word "herein," contained in the residuary bequest; though like words seem to have had much weight in the decision of the case of *Hall v. Graeme*, 9 Sim. 515, adversely to a contention such as the appellants make here: see also *Early v. Benbow*, 2 Coll. 342; and *Radburn v. Lewis*, 3 Beav. 450, but, again, there are cases and cases; and it may be true none of the cases is as much like this case, as two blades of grass are like one another: and yet they are something in the respondent's favour.

The contention that the original pecuniary bequests to the appellants cannot be looked at for any purpose, being in effect revoked by the first codicil, could not help them if it were right because the codicil, upon which their present rights depend, must of course be looked at, and it proclaims what such original bequests were: but I would be

very sorry to think that in no case can a revoked part of a will be looked at with a view to finding the testator's meaning; that the Courts must blind themselves to that which cannot but be, in some cases, of great aid in the due performance of their tasks in such cases as this; as a like method is in the interpretation of the statute law and in other cases.

I decline to give to the codicils any greater revocatory effect than their words make necessary. I also decline to look only at two sets of figures, one in the will and the other in the codicils, in seeking the testator's intention upon the questions involved in this appeal. To look at the whole will is anything but guessing at the testator's state of mind; disregarding anything in the will or codicil that throws light upon the subject and concentrating the mind upon one provision only, is in cases of doubt, likely to lead to error. If we would see and understand this will-picture, and all it was intended to convey, we must not be captivated, like the savage, by primary colours, only, but must give to all tones their due weight in the whole scheme.

I would dismiss the appeal: though, if this case were *Courtauld's case*, I would probably likewise dismiss the appeal: neither can, by reason of their differences, control the other.

HON. MR. JUSTICE MAGEE:—The will in this case is dated 13th February, 1904. The testator died on the 24th May, 1910. In those six years there was opportunity for change not only in the amount and items of his estate but in the circumstances of his children and his views of their reasonable expectation or needs of benefits or further benefits at his hands. And we find him making changes in the disposition of his estate. The first codicil is dated 22nd June, 1906, and was evidently made partly in consequence of some alterations in his estate, by sale and purchase and partly because of the death of some beneficiaries and partly on reconsideration of the claims of his children. The second codicil is dated 24th March, 1909, and affected only his children.

The testator had considerable land and personal property. He had been twice married. He mentions in his will six sons, David, Henry, Earl, James, Gordon and

Bryson, and four daughters of whom two were married and a son of another daughter. Of the six sons the last mentioned four were evidently minors. They are said to be children of the second marriage. He expressly devises among five of the sons nineteen farm half lots, two quarter lots and fifty acres more, and then directs all the balance of his real estate to be sold. In the division of the specified lots among his sons there is apparently great inequality if one might say so without having values. Some are given absolutely, some with restraint on selling, and some only for life with remainder only to sons of the devisee. One son Henry gets none at all except a remote possibility of a life estate. David and his family only get two half lots and in the case of each of the six sons if he leaves no son surviving some of the property goes over to one of his brothers and not to his daughters. In the chances to arise out of failure of sons there is no equality. James would get Earl's share and his own. Gordon would get all three, Bryson all four, and Henry the same four without the other brother or brothers sharing. Then he makes six bequests of \$2,000 each one to each of his six sons. Then to his daughters he gave no land but to one unmarried daughter \$5,000 and a piano, to another also unmarried \$5,000, a married one \$3,500, and to another a life interest in the income from \$3,000 the principal of which would go to her children, and he gives to the son of another daughter \$1,500. These pecuniary legacies to his sons, daughters and grandson amount to \$30,000. Among his own brothers and sisters, nephews and nieces he gave \$9,000 in varying sums, and he bequeathed \$2,000 in fifteen other legacies of sundry amounts. Besides these he gave \$10,000 to the children by the second marriage upon their mother's death, she having the income therefrom during her life. He directed that "the sums herein bequeathed" to the children of his first marriage were to take precedence of all other legatees "herein mentioned" as to the time of payment.

Beside making these pecuniary bequests which foot up to \$51,000 and giving specific legacies of chattels and some income from Earl's land to his wife he gave for or to Earl at his majority a quantity of farm stock, implements and provender evidently worth over \$2,000 on the homestead farm. Then he puts in a proviso that in the event of his

personal property being insufficient to pay all the legacies "herein mentioned" they should abate proportionately. Finally he adds the clause now in question. "All the rest, residue and remainder of my estate both real and personal not hereinbefore disposed of I give, devise and bequeath to my children they to share in said residue in proportion to the personal property herein bequeathed to my said children, but in calculating the said proportions the personal property bequeathed to my son W. H. Earl Hunter is fixed at two thousand dollars." Evidently this last sentence was intended to prevent Earl ranking on the residue in respect of the other personal property bequeathed to him.

Here then we have legacies among the ten children varying from the income for life of \$3,000 to \$2,000, \$3,500, \$5,000, \$5,000 with a piano, and \$2,000 with a postponed interest in \$10,000, and one getting that with chattels worth over \$2,000 as well. And the residue was except as limited in the case of Earl to be divided in those unequal proportions.

Looking at the provision for possible insufficiency, it would seem that in 1904 the testator considered his personal estate not specifically bequeathed would be about \$51,000. If one may hazard a conjecture where conjectures are dangerous he was in effect saying: "I have about \$51,000 outside of my goods and lands which I have devised specially. I will give \$11,000 outside of my wife and children. I will give my wife the income from \$10,000 but subject to the postponement of that \$10,000; the other \$40,000 I divide among my children in these varying amounts and I doubt if there will be any balance, but if there should be "let them divide it not equally but in the same proportions in which they get the \$40,000."

Then comes the first codicil. He had purchased some other properties, disposed of part of the lands devised to David and part of those devised to Bryson, so he cancels the devises of the parcels so disposed of without giving any reason he takes away the remainder of David's land and adds it to Bryson's devise and adds a quarter lot to Gordon's giving him a life estate with remainder to his sons. Legatees of \$1,050 had died, so he cancels those bequests reduces another by \$50 and makes a change in the bequest to a sister. Then he makes a bequest to David in these words: "I hereby order and direct that the sum of \$7,000

shall be paid to my son David John Hunter in the place and stead of the sum of two thousand dollars bequeathed to him by my said will." And he made another bequest of like amount to Henry in similar words. He cancels the clause as to priority between the children of the two marriages, but the clause as to insufficiency of his estate is not disturbed.

This bequest to David though it may have been given to him to make up for the land taken from him is not stated to be in lieu of the land but in the place and stead of the \$2,000 of money. Henry who had practically got no land was not losing anything and so the increase of \$5,000 was a direct benefit.

Here then we find the testator rearranging his estate in view of the changed conditions and change of mind but again with no sign of equality. Two sons get \$7,000 each but no land, two daughters \$5,000 each, another \$3,500, another with her children \$3,000, and four sons \$2,000, beside the specific legacies to one son and one daughter and beside the remainder in \$10,000 to the children of the second marriage only.

This first codicil raised the whole question which is here for decision. That question is—did the testator by this substitution of \$7,000 for \$2,000 to David and Henry intend that they should share in any possible residue in that increased proportion.

But we are not left to it alone. Comes the second codicil in which he gives his daughter Sarah a life interest in a half lot with remainder to one of three brothers if living, and he revokes "the bequest in my said will in favour of my son Henry Albert Hunter and in lieu thereof" gives him a section of land in Alberta and gives him another section there. The codicil proceeds: "This revocation of the bequest in my said will in favour of my said son Henry Albert is not to apply to his share of my estate as "set forth in the residuary paragraph of my said will. In all other respects I do confirm my said will."

This second codicil is of importance as shewing that he considered the will and first codicil as being his will. It clearly was not the \$2,000 which he was taking away from Henry but the \$7,000, and he speaks of it as being "the bequest in my said will." But the codicil shews more. The testator evidently feared that by this revoca-

tion there would be no personal property bequeathed to Henry and therefore Henry would not even get a share of any surplus and so he guards against that by saying that Henry shall still share in the residue. That, I think, shews that he considered that the division would be in proportion to their legacies as settled not merely by the original will standing alone but by the will and codicils taken together as he himself took them as being his will, and that if the legacy were cancelled the share in the residue would go with it unless he provided otherwise. Then he goes on to confirm "my said will." What will? Certainly not the original will but the will and codicil which together he made his will.

I think this second codicil is strong evidence that he had by his will given David and Henry each \$7,000 and that those legacies stood as indeed the second codicil said they stood "in the place and stead" of the \$2,000 and as if written and "herein bequeathed" in the original will which should be read with that substitution.

It was pressed upon us that the will evidenced an intention of equality among the sons, a simple principle of levelling which the testator had in mind and which should not be lightly disturbed. But there is no basis for that argument. The facts are to the contrary. I have summarized the effect of the will with a view to that assertion. True, he gave each son \$2,000 and it may incidentally be noticed that he did not put them all in one clause but mentions each separately as if giving each separate consideration. But he does not make the residue divisible upon the basis of that equality of those six legacies. He divides it on the basis of the whole personalty given to them respectively. He had present to his mind the effect of doing so, for he limits Earl to a basis of \$2,000 but did not limit his brothers of the second marriage who would also share in the \$10,000 after their mother's death. So that among the six brothers we are in the will itself getting three different rankings. Where is the sign of equality? Leaving aside very unequal division of the realty we look for it in vain. As between the daughters no two alike. As between the daughters and sons palpable inequality. As between the sons of the first marriage and those of the second \$10,000 more given to the latter by the will somewhat equalized by the first codicil and again made unequal by

the second, and as between the latter themselves. Earl is given more and ranks for less than his brothers. And as regards all the children they are to share in the residue not in proportion to the total property each gets but only the personal property. It is not often one meets with a will with more apparent inequality. Had we found in the original will the legacies of \$7,000 to David and Henry instead of the \$2,000 one would not be surprised or have felt it unjust. Henry was getting practically nothing else. It might or might not have been unjust but for all that appears it would have been more just than the \$2 000. No argument can be based on injustice or inequality as regards either David or Henry and under the wording of the first codicil the rights of both are on the same footing as to the residue. In view of the care taken in the second codicil as to the residue it is evident that the testator had chosen his words in the first codicil and still approved of them. He could as readily have given David and John each a further \$5,000 but he gave the \$7,000 "in the place and stead" of the \$2,000 indicating as I think that it should be read into his will as if originally so written.

In my opinion the true deduction from the will and codicil is this: The testator was directing his unspecified real estate to be sold and thereby turned into personalty and had from time to time his own idea of the value of his estate. He inserted and left standing in his will the provision for its possible insufficiency. By the codicils he was adapting his dispositions to the varied conditions of his estate. In effect he was saying at each of the three stages: On the assumption that my estate is so much I specify the amount my children will get out of that total. There may not be enough but there may be more and if so let them take it in the same proportions and not equally. That seems to me to be the substantial intention throughout and the one which he meant to give effect to and the wording of both the first and second codicils seems to me to support it and shew that he was at each stage considering the case of each child by itself and not attempting any general system of equality. Such a scheme is a reasonable one and I do not think any argument against the appellants can be drawn upon the ground that the construction put forward by them would be an obvious interference with an equality plan which never existed.

In connection with the deductions which are as I think to be drawn from the codicils another fact is worthy of note. By the will the sums "herein bequeathed" to the children of the first marriage were to be paid first. But so soon as he makes their bequests \$10,000 more by the first codicil he cancels that direction. The inference most obviously suggested though not perhaps a very strong one would seem to be that he considered the \$14,000 was to be looked on as "herein bequeathed" and it would be unfair to have priority for so much.

The case of *In re Courtauld's Estate*, 47 L. T. R. 647, does not seem to me so strong as the present one in its indication of the testator's intention. Of course each testamentary document must be considered upon itself and its surroundings. Seldom are two alike. In the Courtauld case the legacy was actually revoked and then the larger one given in "substitution." Those words are certainly not more indicative of intention than "in the place and stead of" which we find here and which effect the substitution without revocation. Then in the case referred to the words "in the same manner as if they were here repeated" did not apply to the gift but to the "trusts and provisions" which were to govern it and which were indeed thus there repeated in short form as if it were necessary to repeat them in the codicil, instead of treating them as being stated in the will and still applicable because it was only a substitution of one amount for another. It appears to me that the testator's understanding of his own words is more clearly indicated by the codicils here which shew that he treated the words of the codicil as written in the will and not the words of the will as written in the codicil.

I fully agree with the views and reasons of my Lord the Chief Justice and would allow the appeal.

DIVISIONAL COURT.

JANUARY 24TH, 1912.

SINGER v. RUSSELL.

Principal and Agent—Agent's Commission on Sale of Land—Implied Promise—Taking Benefit of Agent's Exertions in Finding Purchaser—Findings of Trial Judge—Appeal Dismissed.

DIVISIONAL COURT, *held*, that slight services in bringing together the parties so as to result in a sale is sufficient to entitle an agent to his commission on the sale of lands.

Burchell v. Gowery, C. R., [1910] A. C. 250, followed.

An appeal from a judgment of HIS HONOUR JUDGE DENTON, of York County Court, dated 9th November, 1911, in favour of plaintiff, a real estate agent, for the sum of \$187.50, for commission at 2½ per cent. on \$7,500, on a sale by the defendant to one Badali of real estate on Queen street, in the city of Toronto.

The appeal to Divisional Court was heard by HON. SIR JOHN BOYD, C., HON. MR. JUSTICE RIDDELL and HON. MR. JUSTICE SUTHERLAND.

D. Macdonald, for the defendant, appellant.

J. M. Ferguson, for the plaintiff, respondent.

HON. SIR JOHN BOYD, C.:—One Black, a tenant of the corner lot (Queen street and Logan Avenue), called attention to the lot in conversation with Badali, who became the purchaser, and told him who was the owner and about an attempt to buy it. This was about a month before the transaction now under consideration and is not connected with the present transaction. The plaintiff, who is a land agent and collected rent from Badali, fell into conversation with him about the 24th October, 1910, about the desirability of his purchasing this lot, and finally said to Badali that, as he was a land agent, he would try to interview the owner (the defendant Russell), and find out the price of the property. He did not go to buy the place for Badali, nor was he so commissioned. Badali asked Singer what would be the expense to buy the lot, and Singer said it would be \$10 or \$15 for the lawyer.

At the first interview Singer says he told Russell he was a land agent and asked him if he would sell and how much he would ask for the lot. The defendant would not give a stated price, told him of people that had been after the property, and told him of prices that had been offered him, and told the plaintiff to go and get an offer and he would consider it. The defendant appeared anxious to sell and said he would sell if the plaintiff were to give him a satisfactory offer (p. 9). (1) The defendant's version of this first conversation was that he was not particular about selling, that he did not know Singer was an agent, but thought he was buying for himself, but admits saying, "Make me an offer for the property, no matter what it is."

(2) Two days or so after occurred the second interview with the defendant. Meanwhile Singer told Badali that Russell wanted an offer, and one was prepared in which \$7,000 cash was offered by Badali under his signature, witnessed by Singer as agent. This is in the usual printed form, filled up in writing as to the blanks, and is dated the 26th October, 1910. This offer was handed to the defendant and by him retained for some days, which he asked for its consideration, and was refused by him after that interval. What occurred on the second occasion is thus given by the plaintiff. Russell noticed "commission" marked on the printed offer, and he said, "I suppose you expect commission?" "I said, 'yes, I expect the regular 2½ per cent.' I left offer with him and went away." The defendant does not appear to recall this conversation, and I do not find that he specifically contradicts it.

(3) The third interview was when Singer returned after the three days, and the plaintiff gives the details thus: Russell refused the \$7,000 and said it was not enough. I said "How much do you want?" and he said, "I want \$8,000." I said I would like to get it for you: I am working in your interests and I would like to be able to put it through for you. I said I would go and see my man again and see if he will make it \$8,000. Before I left, he said, "Well, I will give you 4 days to get the \$8,000 for it." In cross-examination the plaintiff puts it thus: "Fetch me an offer within 4 days for \$8,000 and I will accept it." The defendant's version is different of this third meeting: He says, "The plaintiff pressed me to put a price on it, and by looking over the document (offer) I saw he was an agent and I pay

the commission and I asked \$8,000 for the property. I did not know he was an agent up to that time of course." The plaintiff says: "I gave him 4 days to find me a purchaser (p. 22): Agency and commission was spoken of at the first and second meeting." The defendant does not admit speaking in any way to the plaintiff about commission. I may say that on reading over the evidence I am not favourably impressed with the way in which the defendant's evidence was given, and I would accept the recollection of the plaintiff and his witnesses as against the defendant's contradictions.

The plaintiff forthwith returned to Badali, but could get no definite result within the 4 days. He went to Badali three or four times and tried to induce him to give a higher offer. Badali said he would give plaintiff an offer for perhaps \$7,500, but did not feel inclined to give \$8,000. On the night of the 8th November Badali was to call the plaintiff up to let the plaintiff know if he would give an offer to take to Russell, but before then Badali had gone directly to Russell and purchased at \$7,500. Badali was going to give an offer for \$7,500 to the plaintiff, but he did not do it, and instead of that he closed directly with the owner.

When Singer saw Badali about increasing his offer, Badali said he would have to think it over, and then in conferring with the other Badali, his brother, (who was called as witness), he came to the conclusion to go and speak to Russell. Badali says: "I went to see Russell to see what kind of idea he got, if he want to sell or not, to see if I would do any better myself, a little better myself" (p. 17).

Both brothers Badali agree in their account of what was said by them, and defendant Russell said: "Are you the one that Singer got the offer from?" I said yes. I said, what do you want for the property? And he says \$8,000. I said, I will give you \$7,500, and Russell said, how about the commission? Who is going to pay the commission to Singer? I said, "I don't know about the commission," and he said, "Didn't Singer ask you for commission?" I said, "No, he only asked \$20 for the lawyer."

Then Russell said: "Well, I think I will sell it to you, and if I have to pay the commission I will pay it; but if not, I won't."

The written offer was for \$7,000, \$100 cash and the balance in cash on completion. What was accepted was \$7,500,

\$100 paid down, \$2,500 on mortgage, and balance cash. The defendant's account varies from that of the Badalis. He says, I asked are you paying Singer anything for carrying on this business for you, and they said they were paying him something, I can't just remember the amount they told me. No lawyer's fee was mentioned by Badali at all. I did not know till after the sale that Badali was the man Singer had been speaking to me about. I did not consider I had anything to do with Singer. If Singer had got me \$8,000 I understood then I would have paid him (p. 22). This sale took place about 7th or 8th November.

It appears that the defendant, after the 4 days given to get the \$8,000 offer were up, and before the 8th November, sold to the Bank of Toronto, and the way it is stated by him is significant. I quote his language: In the meantime, after they failed to come up with the offer of \$8,000, I sold it to the Bank of Toronto, and then I got a letter from the manager, stating that the board considered it a little too far west. I was mad that night they came up or I would not have sold it." (p. 31).

Next morning after the sale, Singer went to the defendant and asked for his commission, and the defendant said he had put through the sale himself, and so refused to pay.

I cannot doubt that the defendant knew that Singer was a land agent from the time they first met in this transaction, and he then employed the plaintiff to get him an offer, saying he would sell if he got a satisfactory offer. Nor can I doubt that on the second occasion when the offer of \$7,000 was submitted there was a talk about commission, and that the plaintiff told the defendant that he expected to get it at the regular rate which was mentioned. On the third occasion, the plaintiff was told to fetch an offer at \$8,000 in four days, and it would be accepted. It was, of course, open for the defendant to sell otherwise after the lapse of the four days, and this he did to the Bank of Toronto—but this sale came to nothing almost at its inception.

Next comes the present purchaser Badali in person, whose coming is naturally and reasonably attributable to the previous intervention and negotiation of Singer. The owner appreciated the situation and realized the connection by agitating the question of commission with the Badalis, but resolved to get out of it if he could.

The plaintiff was all labouring the matter with Badali and had got him up to the point of \$7,500; and, had that been put in writing and carried to Russell, there would have been no peradventure as to the right to commission. But, apart from this method of dealing, Singer brought the vendor and purchaser together, and practically introduced a willing purchaser to the owner and at the owner's request.

The owner first fixed a definite price on this third occasion, but that did not displace the employment of the agent to get a satisfactory offer. The defendant was ready to sell at \$7,500, and the purchaser was willing to give it, and the sale made between the two was clearly traceable to the exertions of Singer, whose "man" made the satisfactory offer in person instead of putting it into writing and letting Singer carry it to the vendor.

There is made out from these interviews an implied contract to pay the agent commission for his effective services, and no difficulty arises about any express contract ousting the operation of the implied contract. The reference to express contract arises from an inadvertent misquotation of the evidence by the Judge. He has confounded question with answer, as will appear by quotation. On the examination of the plaintiff, he is asked, "And he said to you, you bring me an offer for \$8,000 within four days and I will pay you a commission? Is that what was said?" Answer: "No, he did not say, 'I will pay you a commission;' he said, 'Fetch me an offer of \$8,000 within four days and I will accept it.'" Evidence, pp. 10 and 11. There was no express bargain about commission according to the evidence of both parties; but, on the plaintiff's evidence, there is clear enough proof that he was working upon an implied promise of compensation. This being so, the defendant takes the benefit of what was done by the agent in preparing the way for the final sale, and whose intervention efficiently furthered the completion of the transaction.

Slight service in bringing together the parties so as to result in a sale is sufficient. *Mansell v. Clements*, L. R. 9 C. P. 139, per Keating, J. It is for the jury (or a Judge) trying the case, to say whether the sale was or was not brought about by the agency of the plaintiff, by his introduction or intervention: *Lumley v. Nicholson*, 34 W. R. 716. The principle of the decision in *Re Beale, Ex p. Durrant*, 5 Mor. 37 (1888), is applicable in its facts, where the test is

explained by Mr. Justice Cave to be, whether the sale has been brought about in consequence of the introduction, and is traceable thereto.

The learned trial Judge has come to the conclusion upon the evidence in favour of the plaintiff: there is evidence well warranting this result, and I think his judgment should be affirmed with costs.

HON. MR. JUSTICE SUTHERLAND:—Some weeks before the 24th October, 1910, Badali had casually learned through one Black, the tenant of the property, that the defendant owned it and the price at which he had offered to sell it to the latter. It did not appear in evidence at the trial what this price was. Neither Badali nor Black, however, approached the defendant about the matter. On that date, the plaintiff being in Badali's fruit store on Parliament street, was asked by him what he considered the value of the property in question, and gave his opinion. Seeing the apparent interest of Badali in the matter he suggested that he would see the owner and ascertain his price. He called on the defendant and says that he introduced himself by name and stated that he was an agent. He also says that the defendant did not on this occasion wish to give him a price upon the property, but told him to go and get an offer and he would consider it. Thereupon the plaintiff returned to Badali and secured a written offer, from which I quote in part: "Offer to Purchase. To John Russell, I, Mr. Badali, of the city of Toronto (as purchaser) hereby agree to and with Russell (as vendor) through J. Singer (agent) to purchase all and singular the premises situate on the north side of Queen street," etc., at \$7,000. This offer to be accepted by the 29th day of October, 1910, otherwise void, etc.

It was signed by S. Badali, and witnessed by J. Singer, the plaintiff. Below Badali's signature the following is printed: "I hereby accept the above-named offer and its terms and covenant, promise, and agree to and with the said to duly carry out the same on the terms and conditions above mentioned, and also agree with said agents to pay them the usual commission." He returned to the defendant, handed the offer to him and asked him if he would accept it. The plaintiff's version of what then happened is as follows: "Well, I don't think that there was very much conversation took place at that time. He said he wanted a

few days to consider it and told me to come back. He read it over and he noticed the commission marked upon it and he said, 'I suppose you expect commission.' I said, 'Yes, I expect the regular 2½ per cent.'"

The offer was left with the defendants and the plaintiff returned in a few days when the defendant told him it was not enough money for the property. He was asked how much he wanted and answered \$8,000. Before the plaintiff left him on this occasion he states the defendant put it in this way: "Well, I will give you four days to get the \$8,000 for it."

The plaintiff went back to Ralston and what then occurred between them is told by him as follows: Being asked at the trial if he had secured an offer for that amount he says: "A. Not within that four days. I had been to him three or four times trying to induce him to give me an offer; he said that he would give me an offer for perhaps \$7,500; that he did not intend to give \$8,000."

Q. Then what next took place? A. Well, on the night of the 15th Mr. Ralston came and called me up and let me know that he was willing to give me an offer for the property to take to the bank and that he was willing to give me \$8,000."

Q. Now, did you accept Mr. Ralston's offer of commission? A. Yes, I did. I accepted it. I was told that Mr. Ralston was willing to give me an offer for the property and I went to the bank and got the money and gave it to him."

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not exactly making up his mind in such a hurry, I could not hold him; he wanted a few days to consider it himself; I thought perhaps I might be able possibly to get \$8,000 from him. I tried my best to get \$8,000 for it so that I would be able to go there and Mr. Russell would not refuse."

The purchaser, Salvador Badali was called on behalf of the plaintiff and says at p. 13: "One night Mr. Singer happened to come over to my place, you know to buy some fruit—I ain't sure—buy fruit or get rent—I ain't sure which, and we started talking about property and we said to Mr. Singer—I said to Mr. Singer: 'What do you think about this corner of Queen and Logan?' He said, 'That is a nice property,' and he said, 'Have you any idea to buy?' I said, 'Yes, if the price suit me, I think I get a notion to buy.' He says, 'Well I am an agent,' and I said, 'I know.' 'Then I go and see the owner,' Mr. Singer said: I said myself to Mr. Singer, I said, 'What will the expense will cost me to buy the property,' and he told me \$15 or \$20 for the lawyer, and that is all he told me." He corroborates the plaintiff about giving him a written offer to take to the defendant at \$7,000; about plaintiff returning and saying that the defendant wanted a few days to think it over, and coming back again and telling him that he would not accept \$7,000 and wanted \$8,000. He then states that a night or two afterwards he thought he would go and see Russell himself, and in company with his brother did so, whereupon the following conversation he says occurred: "And I went over to Mr. Russell, and soon as we get into Mr. Russell and Mr. Russell tell me, he says, 'Are you the one that Mr. Singer got the offer from?' I say 'yes.' He say, 'Well'—you see Mr. Russell tell Mr. Singer he won't accept the \$7,000, so I said, 'What do you want for the property,' and he says, 'I want \$8,000' and then I say, 'I think that is a little too much,' so I say, 'I will give you \$7,500,' and then Mr. Russell say, 'How about the commission.' He says, 'Who is going to pay the commission to Mr. Singer,' I said, 'I don't know about the commission,' and he said, 'Didn't Mr. Singer ask you for any commission?' And I said, 'No,' I say, 'Mr. Singer only ask me \$20 for the lawyer,' because I ask him that myself, you see, what the expense will be, and he says then, 'Well, I think I will sell it to you,' and he put his hand upon his head and he say, 'I think I will sell it to you, and if I have to pay commission I will pay it, and if not I won't.' that is what Mr. Russell told me.

Q. And did you buy the property from him for \$7,500?

A. Yes, and I give him a deposit of \$100."

Joe Badali, a brother of the purchaser, was called and he corroborated in detail his brother's testimony as to what was said at Russell's on the occasion when the sale for \$7,500 was made.

The defendant denied that the plaintiff had told him on the first occasion when he saw him about the property that he was an agent, and says that he was not aware of this until after the written offer from Badali at \$7,000 was left with him, when he saw it stated on its face. It seems rather extraordinary that when the very object which the plaintiff had in going to the defendant was to try and effect a sale of the defendant's property and secure a commission from him he should not have disclosed the fact to him. It also seems curious that on receiving from the plaintiff Badali's written offer he should not have looked it over before asking for a few days to consider it. He must, I think, be assumed to have done so and to have then discovered if he did not know before, as I think he did, that the plaintiff was an agent and that the question of commission would arise. It would also look as though he then had in mind to sell at a price not greatly in excess of \$7,000 or he would at once have told the plaintiff he would not sell at that figure and not taken some days to consider the matter. The defendant, however, puts it in this way: "A. Well, he went away, and I think a day or so after he came back with an offer and he had on the offer it gave me 3 days to consider it, so after the three days was up he came back and I told him I could not accept his offer, and he pressed upon me to put a price on the property, and by me looking over this document I saw that he was an agent and I pay the commission, and I asked \$8,000, for the property; I did not know that he was an agent up to that time of course."

The defendant also says that when the sale was finally made to Badali the following conversation occurred: "I asked him 'Are you paying Singer anything for carrying on this business for you,' and they said they were paying him something—I cannot just remember the amount now, but they told me though; I did not consider that I had anything to do with Singer.

Q. That is after the sale was made? A. Yes, and I would not back out of it.

Q. You have heard what the Badalis have said about your paying the commission? A. Yes; I never mentioned anything—there was no mention of the commission to nobody, but if Singer had got me \$8,000 I understood then I would have paid him.

Q. There was no mention of commission at that interview? A. Well, I asked him who was going to pay Singer, and they said they were paying him something; they did not say what the amount was at all."

And then again at p. 25, the defendant states:—

"Q. And when you sold the property to the Badalis you knew that these were the men that Mr. Singer had been speaking to you about? A. I did not know until after I had sold the property." And again at p. 32 on the cross-examination of the defendant: "Q. You see what these Badalis say is that when they went there that night you said to them 'Are you the men that Singer got the offer from?' A. There was nothing of that mentioned at that stage of the game.

Q. Well, that is what they both swear to? A. I cannot help what they swear to."

The learned trial Judge has found, in his judgment, p. 37, as follows: "The plaintiff then asked him to place a price upon the property, and the defendant said, 'Bring me an offer within four days of \$8,000 and I will accept it and pay a commission.'"

I do not find anywhere in the evidence anything to support the statement that the defendant said "and pay a commission." Neither the plaintiff nor the defendant says this. This plaintiff on the contrary says, at p. 11: "A. No, he did not say, 'I will pay you a commission, he said. 'Fetch me an offer of \$8,000 within four days and I will accept it.'" And the defendant says at p. 22, "and by me looking over this document I saw that he was an agent and I pay the commission, and I asked \$8,000 for the property; I did not know that he was an agent up to that time, of course.

Q. Did you give him any period within which to find you a purchaser for the property? A. Four days."

At p. 25: Q. So that, as I understand it from your evidence, if \$8,000 had been procured for the property you were quite willing to pay a commission? A. That is correct?

The trial Judge says: "The evidence of the plaintiff and Badali, coupled with the fact that the defendant had the first written offer in his possession for more than a week before the sale was made and that this offer mentioned the plaintiff's name as an agent, convince me that when the defendant sold direct to Badali he knew that Badali was the man who had been introduced to him by the plaintiff through the first offer and the man to whom the plaintiff had been trying to effect a sale.

"The weight of evidence I think is also in favour of the view that on the day on which the sale was actually made there was some discussion about the plaintiff's commission, so that when the defendant made the sale to Badali he knew that there might be some claim made to the commission. I am inclined to think that the defendant then concluded that as the plaintiff had not brought the offer within the 4 days that he had mentioned, he was not liable for the commission and that in any event he would take the chance."

"Is the plaintiff on these facts entitled to his commission? I am of opinion that he is. A contract for the payment of commission may be implied from the conduct of the principal or from the circumstances of the particular case."

"When the plaintiff first saw the defendant and the defendant told him to bring an offer and he would consider it, there was, I think, an implied promise on the part of the defendant, that if the plaintiff brought him an offer which he accepted or brought about a sale, that the defendant would pay him a commission. The plaintiff brought the purchaser and the vendor together, and while the agent did not complete the transaction, he is nevertheless entitled to commission if there was a promise, express or implied, on the part of the defendant to pay a commission upon the sale being effected directly or indirectly through his agency.

"The defendant's contention is that the only time the defendant ever agreed to pay him a commission was when the defendant said: 'Bring me an offer of \$8,000 and I will accept it and pay a commission.' It may be that that was the only time when an express promise was made; but long before that there was an implied promise to pay the plaintiff a commission, and after an agent has been trying to negotiate a sale on such an implied promise, the defendant

cannot, by express contract with more onerous terms, deprive the agent of his right to the commission. If, instead of the defendant saying, 'Bring me an offer of \$8,000 within 4 days he had said that he would have nothing further to do with the plaintiff and refuse to pay him any commission, and the defendant afterwards sold to the man with whom the defendant knew the plaintiff had been negotiating and whose name had been first introduced to the defendant as a purchaser, the defendant would clearly have been liable. And he must be equally liable when instead of saying he would have nothing further to do with him he by express terms fixed a price (\$500 higher than the price at which it was sold) on which he is willing to pay a commission. If these terms had been expressly mentioned at an earlier stage before any implied promise to pay arose and before the plaintiff had done anything towards bringing the parties together, the defendant's contention would be sound. But on the facts of this case I think the plaintiff is entitled to his commission."

It seems to me the plaintiff at the trial proved facts from which it could be fairly and properly inferred that the defendant, knowing the plaintiff was a real estate agent, placed his property in his hands on an implied promise to pay him a commission if a sale were effected through his acts. It seems to me that it was through the plaintiff and his activity in the matter that the purchaser was introduced to the defendant and the sale ultimately effected. If it be true, as from the evidence and weight of evidence I think it is, that before the sale by the defendant to Badali he said to the latter: "Are you the one that Singer got the offer from?" He approached the negotiations with that in mind, and if it be also true, as I think it is, that before he completed the sale he raised with the proposed purchaser the question of a commission to be paid to plaintiff by asking, as Badali and his brother say, "What about this commission?" or as he himself puts it, "Well, I asked him who was going to pay Singer," etc., and learned that Badali was not paying any commission, then I do not wonder he should say, "I will sell it" and "if I have to pay commission I will pay it, and if not I won't."

As Clute, J., puts it in *Sager v. Sheffer*, 18 O. W. R. 485, at 489: "The parties were brought together by his aid and the form of the agreement entered into by the defendant with the other agents clearly indicates that the de-

fendant realised that the plaintiff had a claim for commission." So here, the conversation at the time of the sale plainly indicates he realised the same thing.

It appears from the plaintiff's evidence that he was actually expecting to have an offer from Badali of \$7,500 which they had discussed and which he hoped to obtain and submit to the defendant, when Badali, the purchaser, himself went and offered the defendant that price. The negotiations were not broken off. The purchaser himself called on the defendant, and the defendant continued them with him knowing he was the man introduced by the plaintiff as the intending purchaser. See *Morson v. Burnside*, 31 O. R. 438, at p. 442. Meredith, C.J., "The case might have been different had negotiations been broken off and the parties left the office at which they had met. They were not, however, broken off, but what took place when the documents were executed was a continuation of the negotiations which had been begun owing to the plaintiff having introduced More as an intending purchaser, and the sale which was finally made at the expiration of the year was the direct result of those negotiations."

In *Wilkinson v. Martin*, 8 C. & P. 1, it was held "The broker will be entitled to his commission, if he was, up to a certain time, the agent or middleman between the parties, although the contract be afterwards completed without his instrumentality or interference."

And see p. 5, where Tindal, C.J., says: "Undoubtedly a dry introduction of one man to another will not be enough; it would be absurd to say that it can be the subject-matter of such a claim as this. But if the introduction is the foundation on which the negotiation proceeds, and without which it would not have proceeded, then the parties cannot by their agreement deprive the brokers of their just remuneration. If the plaintiffs were the middlemen or agents up to a certain time, the parties cannot afterwards deprive them of their right."

In the present case the introduction of the purchaser to the vendor, the defendant, was made by the plaintiff and the latter's acts were, I think, what led to the sale.

In *Green v. Bartlett*, 14 C. B. N. S. 681, an auctioneer and estate agent was employed to sell an estate under an agreement by which he was to receive a commission of 2½% "if the estate should be sold" and "in case the estate should not be sold" he was to be paid £25 as com-

compensation for his trouble and expense. Having put up the estate to auction and failed to sell it, the agent being asked by a person who had attended the sale who was the owner of the property, referred him to his principal and ultimately that person, without any further intervention of the agent, became a purchaser. Held that the sale having been effected through the means of the agent, he was entitled to the stipulated commission. Erle, C.J., at p. 685, said: "The question whether or not an agent is entitled to commission on a sale of property has repeatedly been litigated and it has usually been decided that if the relation of buyer and seller is really brought about by the act of the agent he is entitled to commission, although the actual sale has not been effected by him. I think the sale here, having been brought about through the plaintiff's introduction, the plaintiff is entitled to the stipulated remuneration of 2½% on the amount of the purchase money." And again at p. 686: "And the evidence distinctly shewed that the sale to Hyde was the direct consequence of the plaintiff's act."

In *Wolf v. Tait*, 4 Man. L. R. 59, "the plaintiff was employed by the defendant to sell for him certain lands upon certain terms. He found a man willing to purchase upon less advantageous terms. In this case it was held that the defendant having accepted a purchaser and ratified the variation of the terms was liable for the plaintiff's commission."

See also *Aikins v. Allan*, 14 Man. L. R. 549; *Burchell v. Gowery & Blockhouse Collieries, Ltd.*, C. R., [1910] A. C. 250.

In an action by the appellant to recover an agreed commission on the proceeds of a sale of mining property by the respondent company, the latter contended that he was not the efficient cause of the particular sale effected. Held, that as the appellant had brought the company into relation with the actual purchaser, he was entitled to recover although the company had sold behind his back on terms which he had advised them not to accept.

Lord Atkinson, at p. 625: "The second contention is that if an agent such as Burchell was, brings a person into relation with his principal as an intending purchaser the agent had done the most effective and possibly the most labourious and expensive part of his work, and that if the principal takes advantage of that work and behind the back

of the agent and unknown to him sells to the purchaser thus brought into touch with him on terms which the agent therefore advised the principal not to accept, the agent's act may still well be the effective cause of the sale. There can be no real difference between such a case and those cases where the principal sells to the purchaser introduced by the agent at a price below the limit given to the agent. . . . On these questions of fact there was, their Lordships think, ample evidence to sustain the conclusion at which the Referee presumably arrived, viz., that the appellant's acts were as effective cause of the sale which actually took place. In their Lordships' view it is the right conclusion and the finding to that effect ought not, they think, to be disturbed." *Stratton v. Vachon*, 44 S. C. R. 395.

Held, reversing in part the judgment appealed from, 3 Sask. Law Reports, 286, that as the steps taken by the agent had brought the owner into relation with the persons who finally became purchasers, he was entitled to recover the customary commission upon the price at which the property in question had been sold. *Burchell v. Gowery*, C. R., [1910] A. C. 250, applied. The Chief Justice, at p. 399: "The property was brought by Stratton to the attention of More, who was instrumental in inducing Miller and Robinson to consider it with a view to a purchase on joint account. The subsequent disappearance of More as purchaser before the transaction was finally completed did not operate to destroy the right acquired by Stratton through his original introduction of the property to one of the three associates, two of whom completed alone the purchase begun with and through the men to whom it was introduced originally, and who had undertaken then to buy it or find a purchaser for it."

Davies, J., at p. 401: "The knowledge on the part of the vendor that the person with whom he completes the sale was introduced by the agent is not the test of his liability to pay commission, but the fact whether the agent's acts have brought a person or persons into relation with his principal as an intending purchaser and the sale is effected, the agent has done what he contracted to do and is entitled to be paid."

Anglin, J., at p. 410: "In my opinion, the defendant has established that his introduction was the foundation upon which the negotiations which resulted in the purchase proceeded and it was necessary to shew that the introduc-

tion was the deficient cause in bringing about the letting or the sale.

A perusal of the evidence does not lead me to think the defendant was candid or reliable. He is expressly contradicted by the plaintiff as to when he first learned that the plaintiff was an agent, and upon the evidence of each and the circumstances and probabilities of the matter I would credit the plaintiff's version rather than his. He is also at complete variance with the Badalis as to what occurred at the interview when the sale was concluded.

I would dismiss the appeal with costs and affirm the judgment.

HON. MR. JUSTICE RIDDELL (*dissenting*):—The defendant was owner of premises on Queen street, of which one Black was tenant. Badali was carrying on business on Parliament street and Black passing Badali's shop one day told him that the defendant's property would be a great corner for his business and he ought to buy it and told him further that the defendant owned it where he lived and the price he asked Black for it—apparently \$8,000 although that does not expressly appear. This was about a month before the sale was made, and, therefore, about the end of September or the beginning of October. Nothing was done by Badali upon this information—and on the 24th October, 1910, the plaintiff, who is a real estate agent came into Badali's place and in the course of conversation he (Badali intimated that he might buy the property in question if he could get it at the right price. The plaintiff says: "Well, I am an agent! and Badali said, "I know," the plaintiff, "Then I will go and see the owner." The plaintiff then "went to Mr. Russell to find out whether he would sell it and also how much he would ask for it." The defendant was just about to leave his house, the plaintiff met him at the front door and asked him if he would sell, and if so at what price. The plaintiff says he introduced himself as an agent—this the defendant denies and says that he thought the plaintiff was buying for himself. The defendant refused to put a price upon the property, but told the plaintiff to bring him an offer and he would consider it. Nothing was said or suggested about any commission. Thereupon the plaintiff went to Badali and got him to sign an offer for \$7,000 cash. This offer reads: "Mr. Badali of the city of Toronto (as purchaser) hereby agrees to and with John Russell (as vendor) through I.

Singer, agent, to purchase, etc., etc., one hundred dollars in cash to the said agent on this as a deposit, etc., etc., etc.” On the 29th October this was taken by the plaintiff to the defendant “who then said nothing more than that he wanted a few days to consider it.” The plaintiff says that the defendant noticing the commission marked on it said, “I suppose you expect commission?”—but this the trial Judge discredits as will be seen from the clause I have copied from his judgment — the defendant expressly says he did not know at that time the plaintiff was an agent nor until he, when afterwards looking over the offer, saw that the plaintiff was described as an agent and that the vendor was expected to pay a commission. Up to that time he had thought that the plaintiff was buying for himself. The trial Judge does not discredit the defendant, but rather the contrary as we have seen.

After three days or so, the plaintiff returned and was told that the offer was refused—he urged the defendant to put a price upon the property and at length—the learned Judge finds—the defendant said—“Bring me an offer within four days of \$8,000 and I will accept it and pay a commission. The evidence, however, does not shew that any mention was in fact made of commission; but it is clear the defendant impliedly agreed to pay a commission if the price mentioned was obtained.

The plaintiff tried to get Badali to offer \$8,000 but failed—and some six or eight days or perhaps more thereafter Badali went to the defendant—the defendant had sold to another purchaser, who declined to carry out the purchase and he was “mad” and sold to Badali for \$7,500, \$5,000 cash and \$2,500 on a mortgage. The defendant asked Badali “Are you paying Singer anything for carrying on this business for you?” and the purchaser said he was paying him something—and Badali says that the defendant said, “If I have to pay commission, I will pay and if not I wont.” No doubt is cast by the trial Judge on the good faith of the defendant, and I can find no reason for any.

The learned Judge says further—“The evidence of the plaintiff and Badali, coupled with the fact that the defendant had the first written offer in his possession for more than a week before the sale was made and that this offer mentioned the plaintiff’s name as an agent, convince me that when the defendant sold direct to Badali he knew that Badali was the

man who had been introduced to him by the plaintiff through the first offer, and the man to whom the plaintiff had been trying to effect a sale.

The weight of evidence I think is also in favour of the view that on the day on which the sale was actually made there was some discussion about the plaintiff's commission, so that when the defendant made the sale to Badali he knew that there might be some claim made to commission. I am inclined to think that the defendant then concluded that as the plaintiff had not brought the offer within the four days that he had mentioned, he was not liable for the commission and that in any event he would take the chance."

I have set out the facts as the learned trial Judge finds them where there is any conflict. On this state of facts the plaintiff has been held in the Court below entitled to commission.

I think this case is covered by authority in a sense adverse to the judgment.

In *Toulmin v. Millar* (1887), 59 L. T. N. S. 96, in Dom. Proc., Lord Watson says: "It is impossible to affirm in general terms that A. is entitled to a commission if he can prove that he introduced to B., the person who afterwards purchased B's. estate, and that his introduction became the cause of the sale. In order to found a legal claim for commission there must not only be a causal, there must also be a contractual relation between the introduction and the ultimate transaction of sale."

It is too often thought that the mere fact that a real estate dealer brings about a sale of property entitles him to a commission from some one; but it is clear that this is not the law. Of course, if the owner puts his land into the hands of an agent to sell, the law implies a contract to pay commission on a sale effected through the agent—and the most trifling services on the part of the agent have been recognized as making him the *causa causans* of a sale. "In ninety-nine cases out of a hundred, the services performed by the house agent upon these occasions are of the slightest possible kind; it consists for the most part in merely bringing the vendor and the purchaser together so as to result in a sale. It is often done by a line written or a word spoken," per Keating, J., in *Mansell v. Clements* (1874), L. R. 9 C. P. 139, at p. 143. And see *Green v. Bartlett* (1863), 14 C. B. N. S. 681.

But if the owner upon being asked whether he would sell and if so at what price, does not put the property in the

hands of the applicant as an agent at all, but simply refuses to put a price upon the property and says: "Bring me an offer and I will consider it," at the time supposing that the applicant is buying for himself—how can it be said that he thereby makes the applicant an agent for sale? It takes two to make a bargain, and a contract of agency requires two consenting minds like every other contract.

When the defendant became aware that the plaintiff was an agent and was looking for a commission as he did when he read with any care the offer delivered to him on the 26th October, the aspect of matters was altered—he recognized that if the plaintiff brought him an offer which he accepted, he would claim commission and thereupon he made the first and only contract of agency which he did make with the plaintiff. "Bring me an offer for \$8,000 within four days and I shall accept;" and then he quite understood that he might have to pay commission. If a contract of agency be considered as existing before this, the case would be not unlike *Toppin v. Healey* (1863), 11 W. R. 466. There the defendant employed the plaintiff to negotiate a loan on certain terms, and subsequently before the loan was effected changed the terms. The plaintiff endeavoured to procure the loan on the latter terms and failed; but he procured a loan on the original terms. It was held that he could not recover; the plaintiff had not done what he was to do under the substituted terms and the former terms had been revoked. Williams, J., points out, p. 467: "The letter of the 17th (containing the altered terms) amount to a revocation. The plaintiff might have brought an action for the breach of contract, but he does not, but assents to the substituted terms. Then he has not earned that which he agreed for . . ." And Willes, J., "If the plaintiff chose to treat the letter of the 17th as a breach of contract he ought to have done so at the time. But he did not chose to do so," Erle, C.J., and Keating, J., agreed.

In any view, the only contract of agency between plaintiff and defendant was that created on their last interview. The plaintiff shewed by his conduct that he so understood it—he made every effort to get Badali to make an offer for \$8,000, but failed.

Where the parties have made an express contract, the conditions under which the remuneration becomes payable must be ascertained by the terms of the contract itself.

Barnett v. Isaacson (1888), 4 T. L. R. 645; *Green v. Miles* (1861), 30 L. J. C. P. 343; *Alder v. Boyle* (1847), 4 C. B. 635.

Of course, if what the agent has been employed to do, he does in substance, that is enough. *Wycott v. Campbell* (1871), 31 U. C. R. 584; *Runner v. Knowles* (1874), 22 W. R. 574; 30 L. T. 496; *Johnston v. Kershaw* (1867), L. R. 2 Ex. 82; *Morson v. Burnside* (1900), 31 O. R. 438, but not otherwise.

There is no pretence that the plaintiff did procure the offer or could procure it. Had there been any fraud or bad faith in the matter on the part of the defendant the principle of *Wilson v. Deacon* (1911), 19 O. W. R. 433 (affirmed in Divisional Court) might be considered to apply; but there is no such complication here—there is “no trick to deprive . . . the plaintiff of” his “commission, and to take advantage of” his “services” (per Lord Esher, M.R., in *Noah v. Owen* (1886), 2 T. L. R. 364, at p. 365; *Wilson v. Deacon* (1911), 19 O. W. R. 433, at p. 435.

Willes, J., in *Curtis v. Noxon* (1871), 24 L. T. 706, at p. 708, says: “These actions by house agents spring up at every turn, and as they are generally based upon agreements which they have persuaded people who are not so well versed in the law as themselves to enter into to their injury, they ought not to be encouraged.” Without adopting the learned Judge’s view and without casting any reflection upon an estimable class of the community, I think it would be adding another terror to the ownership of the property if the defendant were to be compelled to pay a commission under the circumstances of this case.

I have not thought it necessary to consider whether the sale was due to the plaintiff at all—the purchaser knew of the property and had it in mind to buy it—he knew who the owner was—and it was rather the purchaser who introduced the plaintiff to the defendant than vice versa. Nor have I thought it necessary to go through the myriad cases in which the owner placed his property for sale in the hands of a land agent—perhaps the latest in the higher Courts are *Stratton v. Vachon* (1911), 44 S. C. R. 395, and *Burchell v. Gowrie, C. R.*, [1910] A. C. 250.

I am of opinion that the appeal should be allowed with costs and the action dismissed with costs.

COURT OF APPEAL.

JANUARY 24TH, 1912.

SANDWICH, WINDSOR & AMHERSTBURG R.W. CO.
v. CITY OF WINDSOR.

Assessment and Taxes—Street Railway—Exemptions—Agreement between Company and Municipality—Construction of Agreement.

ONTARIO R.W. & MUN. BOARD made an order construing an agreement existing between the applicant company and the respondent municipality to mean that the said agreement did not exempt the company's buildings, machinery, etc., from taxation, nor the poles, wires, etc., used in connection with the lighting plant, and confirmed the assessment of the commissioner of the municipality.

COURT OF APPEAL varied above order in respect to the imposition of a business tax on the street railway department of the appellant company, i.e., 25 per cent. of \$50,500, but in other respects affirmed above assessment.

MAGEE, J.A., dissented, being of opinion that the posts and wires of the electric light department (\$4,000) should be exempt from assessment and that there should be no business tax in respect to the electric light department.

An appeal by the railway company from an order of the Ontario Railway and Municipal Board dismissing an appeal from the local assessment of the company's properties at the city of Windsor.

The appeal to Court of Appeal was heard by HON. SIR CHAS. MOSS, C.J.O., HON. MR. JUSTICE GARROW, HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MEREDITH and HON. MR. JUSTICE MAGEE.

A. H. Clarke, K.C., and A. R. Bartlett, for the appellants.

W. M. Douglas, K.C., and A. St. G. Ellis, for the respondents.

HON. MR. JUSTICE GARROW:—After much puzzling over clause 9 of the agreement in question, I have arrived at the conclusion that as to the main point the order should not be disturbed.

As I read that clause, it applies to exempt only the real estate therein mentioned, since it expressly excepts from its operations the real estate not "hereinbefore" mentioned. And the only real estate which is mentioned

is the tracks, &c., enumerated in the beginning of the clause, which, by the statute, are to be interpreted for the purposes of taxation, as "land."

Why so many words should have been used to express so simple a matter is not apparent. It was certainly not necessary for instance to refer to property already exempt by law, and with that part of the clause out it might very well have read affirmatively, thus, "the tracks, right of way, poles, wires, rolling stock and all superstructures and substructures . . . shall be exempt . . ." for that, in my opinion, is what it means, and what the parties intended. This, it may be said, gives no meaning to the words "and all the property . . . not exempted by law," but unless such property was land, or in the nature of land, it was not assessable. And if it was land, then the exception from the operation of the agreement of the "real estate" (which of course includes "land" in the statutory sense), not thereinbefore enumerated, leaves the matter just as it would have been with all these words out of the clause.

I can find no excuse in the agreement for an exemption of the electric lighting property or plant, or for the exemption in respect of it of the ordinary business tax. But the latter tax could not, under the provision of section 226 of the Assessment Act, lawfully be imposed in respect of the other property, as was in effect conceded on the argument.

I would otherwise dismiss the appeal, but under the circumstances without costs.

HON. MR. JUSTICE MEREDITH:—I agree with the Board in their conclusion that the words "all superstructures and substructures" do not include the ordinary buildings, which have been taxed. The words though quite sufficient, in their wider meaning, to include such buildings are seldom, if ever, employed instead of the more familiar, and more applicable, word, buildings: and the context makes it plainer, to me, that the words were used in a narrower sense, indicative of such things as bridges, culverts, &c.

The subjects being dealt with in the agreement were "the tracks, right of way, poles, wires and rolling stock" of a street railway; then follow the words in question "and all superstructures and substructures."

I cannot think that, to business men, in the business world, it would occur that the words in question included all sorts of buildings wherever situated in the municipality, and for whatever purpose used, so long as they were the property of the company seeking to exclude them from taxation.

In my opinion that which was meant by the words in question was structures connected with the tracks, ways, poles and wires, either above or below, of the character I have mentioned and the like.

I also agree with the Board in their opinion that only that property which was the subject of that agreement—the railway—was to be exempt from taxation under its provisions: this seems to me to be also evident if the words of exemption alone were looked at “tracks, right of way, poles, wires, rolling stock and all superstructures and substructures.”

The onus of relieving themselves from taxation in respect of the buildings and of the electric lighting property was upon the appellants, and, to say the least of it, that they have not done.

In these respects I would dismiss the appeal: in other respects the parties agreed as to the result during the argument; and, if they had not, in view of section 226 of the Assessment Act, there would be no excuse for not being so agreed; as it plainly excluded any right to impose a business tax in respect of the property in regard to which a fixed sum has been agreed upon: as to other property it would be applicable.

HON. MR. JUSTICE MAGEE (*dissenting*):—The authority to produce and use electricity for the purposes of its railway was given to the appellant company in 1893 by 56 Vict. ch. 97, sec. 9.

It had been incorporated in 1887 as a street railway by 35 Vict. ch. 64 (Ont.) and received its present name in 1887 by 50 Vict. ch. 80. The Act of 1893 also authorised it to sell or lease “such electricity” produced by it and not required, to any person or corporation, and gave it the power, rights and privileges conferred upon companies incorporated under the Act respecting Companies, for steam-heating or for supplying electricity for light, heating or power (R. S. O. 1887, ch. 165). The last-mentioned act authorised such companies to construct and operate works for production and distribution of electricity and to conduct the same

through the streets, but only upon agreement with the municipality and (by reference to R. S. O. 1887, ch. 164, sec. 51), authorised the municipality to take stock or make loans or contribute in any manner towards advancing the objects of its incorporation.

That power of selling and distributing electricity was in almost the same words as the like power conferred by the Electric Railways Act 1895, sec. 9, upon all companies to which that Act applies, and not wholly constructed or operated within a city, town or village or within one and a half miles thereof. Hence it was a well-known subsidiary power of companies such as this, and indeed one can understand that it would be almost a necessary one for economic management. Prepared as they would have to be for extraordinary demands upon their capacity their appliances must be in excess of their ordinary requirements—and opportunity for full user of such appliances would be as needful as the right of a gas company or municipality to dispose of by-products.

This company, in July, 1902, at the date of the agreement in question was, and had been for some years exercising such subsidiary power to the knowledge and indeed under agreement with the respondent city corporation. By that agreement, of July, 1902, the company and the city undertook to assist in obtaining legislation to validate it, and in the following session the Act (3 Edw. VII. ch. 112) was passed which did so. That Act recites that the provisions of the Electric Railways Act (R. S. O. 1897, ch. 209) were not applicable to this company, and that the company had petitioned for an Act empowering municipalities to give it exemption from taxes as provided by section 77 of that Act, and to confirm the agreement with the city of Windsor. Then section 1 is in almost the same words as that section 77 (except in its express reference to school taxes as to which see Public Schools Act, 1 Edw. VII. ch. 39, sec. 77 and *Pringle v. Stratford*, 20 O. L. R. 276), and empowers municipalities to exempt the “company and its property within such municipality” in whole or in part from municipal assessments or taxation (other than school rates) or agree to a certain sum per annum in gross by way of commutation or composition for payment or in lieu of all or any municipal rates or assessments (other than school rates) to be imposed by such municipal corporation for a

time not exceeding twenty-one years. Then section 2 made valid and binding this agreement with the city.

Thus this company was put on the same level as regards obtaining exemption from or commuting for taxes as the other electric railway companies, and by the same statute which made this previous agreement effectual, and which both parties have assisted in obtaining. It can hardly be said that in giving such powers as regards exempting the property of such companies generally, the Legislature did not intend that their property used for the subsidiary purposes, as well as that used strictly for railway purposes, might be freed from taxation or commuted for. And so with this company. It is true that would not shew that such is the effect of this agreement, but it cannot be said that such a limitation to strictly railway property was necessarily in the intent of the Legislature or either of these parties. And in the case of a municipality exempting "all the property" of a company incorporated under the General Electric Railway Companies Act, it would and should require a very strong case indeed to make out that the property used in the recognised subsidiary purposes of the company would still be liable.

Here then in July, 1902, was this appellant company well known to have these general powers and to be disposing of its surplus electricity. As appears by the recitals in this agreement, the city had made two agreements in 1893 relative to the operation of the railway and which presumably had no relation to the supply of light or power to the city or its residents. Outside of those agreements was the arrangement for the latter purpose. None of these made any reference to taxes as far as appears. The special acts relating to the company had not given any power to obtain exemption, and the General Electric Railway Act did not apply to it in this respect. The company then proposes to extend its railway to Amherstburg, which would as the agreement states benefit the inhabitants of Windsor, and it seeks a modification of the existing agreement, first, by extending the term of its railway franchise till December, 1922, and by cancelling the clauses (whatever they were) "referring to the payment of money or taxes for franchise privileges to the corporation" and by paying certain fixed yearly sums in lieu of taxes upon its property except certain real estate. Both parties agree and put in writing what they agree upon and neither side

suggests that what is put in writing is different from the intention of these two corporate bodies or their representatives. We have simply to take the agreement as we find it.

Until we come to clause 8, the new agreement deals only with railway construction and operation, and refers to "tracks" and "rails" and "lines of railway"—and clause 10 declares that "this agreement shall be read as part of the said two agreements, all the terms of which will be binding . . . except where inconsistent with the terms of this agreement, when the terms of this agreement shall prevail." Clause 8 cancels (on completion of the railway extension) clause 5 in the agreement of April, 1893, "and all clauses in said two hereinbefore recited agreements referring to the payment of money or taxes for franchise privileges to the corporation"; and "the following clause shall be read as a part of the said agreements in substitution for said clause five and of all clauses relating to the payment of money or taxes as aforesaid, namely" the company to pay \$500 yearly till December, 1912, and then \$750 yearly till December, 1917, and then \$1,000 yearly till December, 1922," which said payments shall be in lieu of all taxes or rates other than school rates upon the property hereinafter exempted from the payment of taxes." There is here no intimation of any kind that the subsequent exemption is to be less than it purports to be.

Then clause 9 contains the exemption and reads, "The tracks, right of way, wires, rolling stock and all superstructures and substructures, and all the property of the said parties of the second part (the applicant company and the City Railway Company of Windsor, Limited), not exempted by law from taxes shall except the real estate not hereinbefore mentioned, be exempt from all taxes other than school rates until and including the 31st day of December, 1922." It is evident from a perusal of the agreements, that the word "hereinbefore" can only refer to clause 9 itself.

So here in addition to certain specific items such as tracks, poles, superstructures, &c., which might be real estate, we find exempted for these yearly payments all the assessable property of the company, except any other real estate. These words "all the property not exempted by law" are very wide and when we find the parties making

an express exception stating what is not to be covered by them, I find it difficult to get foothold for any other exception than what they have mentioned. Both parties knew that the company was producing electricity and disposing of its surplus, and distributing it to its customers, and that such was its recognised business, and that in distributing it used and would need poles and wires and appliances outside of what would be required for railway needs. And both sides agree upon fixed yearly sums, which so far as appears are not based upon, and have no relation to the operation of the railway proper. Then having used these broad words and expressed the only exceptions thereto, they go to the Legislature and obtain this Act of 1903 which as I have said certainly gives no hint of any limitation of the bargain, but puts the company in the position of obtaining like others the broadest exemptions covering all its property. So far as appears this agreement was in no sense a gift from the city. It was a bargain in which the company was to do something to benefit the inhabitants as well as pay money to the city corporation itself. I find nothing in the nature of the transaction from which to conclude that the parties did not mean exactly what they said, and no rule of law which in the circumstances of a specified exception and a cash payment not limited for particular properties, would enable me to construe the words in any more restricted sense—and where no rectification is sought the rules of law and equity in the construction of the agreement must be the same.

A fact not without significance is that in the previous March, 1902, section 18 of the Assessment Act had been amended by 2 Edw. VII. ch. 31, sec. 1, which enacted that the rails, ties, poles, wires, pipes, mains, conduits, substructures and superstructures upon the streets of the municipality belonging to companies for supplying light and power, and companies operating street railways and electric railways and certain other companies, should be deemed "land" within the Assessment Act, and be assessed, but the plant, poles and wires used exclusively for a steam railway and not for commercial purposes, should be as theretofore exempt from taxation, and that save as aforesaid, rolling stock, plant and appliances of such companies should not be "land" and should not be assessable.

Reading the exemption clause in the agreement of July, 1902, it is difficult to believe that the parties had not that

new assessment provision in mind. The use of the words "superstructures and substructures," and their insertion somewhat out of their natural order after "rolling stock," which is personalty, and the care in limiting the real estate to that "not hereinbefore mentioned" would all indicate to me that the Act of 1902, was in the view of the parties settling the agreement. If so, that section would have brought to their attention the different functions of this company, and warned them to exclude the lighting part of the business from the operation of the wide exemption if such was the intention.

There is also the fact that until the assessments now in question, the company has not since the agreement been required to pay on the basis now contended for by the city, though that would not disentitle the latter if the agreement were clearly in its favour.

In my opinion the exemption is not limited to the property of the company used for the purposes of the railway itself, and the appeal in that respect should be allowed.

The next question is whether the buildings and machinery fixed to the freehold on the company's lands are liable to assessment as being part of the real estate not previously mentioned, or whether they are included in the words "superstructures and substructures," and so expressly exempt.

As this agreement was not valid until the assent of the Legislature was obtained, and the Legislature is careful to restrict the exempting powers of municipalities, we have, I think, to consider not only what the parties meant, but also what the Legislature meant in allowing this interference with the Assessment Act. The Act, R. S. O. 1897, ch. 224, in sec. 7, declared that all property in the province shall be liable to taxation subject to certain specified exemptions: and in sec. 2 that in the Act the words "land," "real estate" and "real property" respectively, should be deemed to include buildings and all machinery or other things so fixed to any building as to form in law part of the realty. And the amended sec. 18, already referred to, declared certain property of the company on the streets to be "land" and assessable in the ward where the head office was, but save as therein the rolling stock, plant and appliances should not be land (and as amended in 1903, by 3 Edw. VII., ch. 21, sec. 7, the rolling stock should not be assessable) and sec. 39 exempted from taxation all the personal property of a com-

pany which invested the whole or the principal part of its means in railway and tram roads or certain other works. The only references which I find in the Assessment Act to "superstructures" or "substructures," are in the amended sec. 18, and in sec. 32. In the latter, relating to toll roads, the word "superstructure" clearly does not include buildings. In the former the "superstructures and substructures," if judged only by the associated words would not include buildings, but inasmuch as they are upon the streets and public places they clearly cannot do so. Then we have to turn to the agreement itself, and here we must apply the rule *noscuntur a sociis*. As already stated I incline to think the words were inspired by the amendment referred to of sec. 18, where they do not include buildings. But even if not used with reference to that section, they are in the first place very unusual words to use as including "buildings" or "machinery," the words which would first occur to the ordinary draughtsman if intended. And in the second place they are associated with words which bear no relation to buildings or machinery therein, but rather to the roadway and property away from the company's lands, and they have to bear the stamp of their companionship, especially as they are in themselves words which imply relation to something else below or above them, which here evidently are the tracks and right of way. In relation to railways, the words seem to have acquired in the United States, at least, a meaning which excludes the idea of either the buildings, such as these, or machinery therein. Thus in the Standard Dictionary, "Superstructure" is defined as "any structure or part of a structure considered in relation to the part on which it rests: the sleepers, rails, etc., of a railway as distinguished from the roadbed." In the Century Dictionary "(3) In railway engineering the sleepers, rails, and fastenings of a railway in contradistinction to roadbed. In 37 Cyc. 510, a similar definition, and in Am. & Eng. Ency., 2nd ed., to the same effect, and adding "called also permanent way," citing Webster's Dictionary and referring to decisions.

In re Canadian Pacific R. Co. v. Town of Macleod, 5 Terr. L. R. 192 (1901), Scott, J., held that the company's buildings were not "superstructures of the roadway," and referred to a number of authorities: see *Re Assessment Appeals*, 6 O. L. R. 187, and *Re London Street R.*, 27 A. R. 83, 89. In the Assessment Act of 1904, sec. 44, as amended

in 1906, the words are thrice used in relation to railways, but manifestly not as including buildings or fixed machinery therein such as here in question.

The appeal on this question should, in my opinion, fail.

The third question is whether the company is exempted by the agreement from a "business assessment."

This tax (except as to mercantile business), was first authorized by the Assessment Act, of 1904, 4 Edw. VII., ch. 23, sec. 10, sub-sec. 1, whereby "Irrespective of any assessment of land under this Act, every person occupying or using land in the municipality for the purpose of any business mentioned or described in this section shall be assessed for a sum to be called "business assessment" to be computed by reference to the assessed value of the land so occupied or used by him as follows . . . (i) Every person carrying on the business of . . . an electric railway . . . or of the transmission of . . . electricity for the purpose of light, heat, or power, for a sum equal to 25 per cent of the assessed value of the land (not being a highway, etc., or waters or private right of way), occupied or used by such person exclusive of the value of any machinery, plant or appliances erected or placed upon, in, over, under, or affixed to such land." Sub-section 8 declares that "every person assessed for business assessment shall be liable for the payment of the tax thereon and the same shall not constitute a charge upon the land so occupied or used." Section 5 made real property and income assessable. Section 11 made liable to assessment for income tax "every person not liable to business assessment under sec. 10," and not otherwise exempted. Sections 3 and 4 directed taxes to be levied "upon the whole of the assessment for real property income and business or other assessments made under that Act." and sec. 228 repealed the existing Assessment Act, of 1897, and amendments thereof under which personal property was assessable.

If legislation had stopped there, the assessment would have been changed from an assessment of property to a purely personal assessment which though calculated on the value of property, was not a charge upon it, and as the agreement here only exempted "property" and the commutation paid was only in lieu of taxes "upon the property" the company would not be exempted, although it is manifest that the business tax was really substituted for the tax on personalty and on income which under the Act of 1897, was in-

cluded in "personal property." But sec. 226 of the 1904 Act, declared that it should not affect the terms of any agreement made with a municipality . . . for commuting or otherwise relating to municipal taxation, but whenever . . . by any verbal agreement . . . the real or personal property of any person or any part thereof is exempt from municipal taxation in whole or in part . . . such fixed assessment or commutation of taxes or exemption shall be deemed to include any business assessment or other assessment, and any taxes thereon in respect to the property or business mentioned in such . . . assessment to which such person or the property of such person would otherwise be liable under the provisions of this Act." The intention and effect of this section seems clearly to be to remedy the injustice which otherwise might have been done, and to put this company in the same position as if the company as well as its property had been exempted by the assessment. And in the same section, 4 Edw. VII., ch. 24, sec. 3, declared "rateable property" to include business assessments.

On this question the appeal should be allowed. It was conceded that the business assessment in any case was in excess, as it should not have been calculated on the value of machinery.

The last question is whether the exemption applies to the company's buildings and fixed machinery on lands not owned by it, but leased from the Canada Salt Company. As in my view they would not be exempt if they were on the company's own land, and there is nothing in evidence to take them out of the category of real estate, they are in my opinion not shewn to be entitled to exemption.

The net result of the appeal in my opinion is that the assessment of \$4,500 on poles and wires of the lighting business and all the business assessments of \$5,125, \$3,125, and \$1,350, should be struck out, but the other assessments should stand.

Each party should pay its own costs, in my view, as the success was divided.

DIVISIONAL COURT.

JANUARY 26TH, 1912.

RE STURMER AND TOWN OF BEAVERTON

*Costs—Local Option By-law—Application to Quash Unsuccessful—
Real Applicant Liable to Village for Costs.*

DIVISIONAL COURT affirmed judgment of Boyd, C., 20 O. W. R. 560.

An appeal from an order of HON. SIR JOHN BOYD, C., directing one Hamilton to pay certain costs amounting to \$384, the balance of costs in testing local option by-law. See 20 O. W. R. 560.

The appeal to Divisional Court was heard by HON. MR. JUSTICE CLUTE, HON. MR. JUSTICE LATCHFORD, and HON. MR. JUSTICE MIDDLETON.

Lynch-Staunton, K.C., for the appellant, Hamilton.

W. E. Raney, K.C., for the respondents.

HON. MR. JUSTICE CLUTE:—It clearly appeared and was not disputed that the proceedings taken in the name of Sturmer were at the instance of Hamilton and one Overend. Sturmer being irresponsible, they put him forward in order to escape liability for costs; they became responsible to the solicitor who acted for Sturmer for his costs, and they furnished the money paid into Court as security for costs. The amount here ordered to be paid is the amount in excess of the security given.

The Chancellor held, 20 O. W. R. 560, that the proceeding was an abuse of the process of the Court, and that there was inherent power in the Court to make the person who had set the Court in motion pay the costs of the unsuccessful application, and this though the person be not formally a party, but one who is the instigator and supporter of the movement. He further held that under the Judicature Act, there is now ample jurisdiction to deal with costs; full power is given to determine by whom and to what extent costs are to be paid, sec. 119.

Mr. Staunton strongly urged that the rule here invoked was only applicable in cases of ejectment because in those

cases the tenant is put forward by the landlord as a party, and that the Court has no jurisdiction to bring any one not a party before the Court and order him to pay the costs, and that the Judicature Act has no application to the present case, and does not extend the rule to a case like the present.

He further pointed out that in the present case the applicant had a right to move and that it was only in those cases where the applicant had no right the rule applied.

The case chiefly relied upon by the appellant was *Hayward v. Giffard* (1838), 4 M. & W. 194.

The affidavits upon which the rule in the Hayward case was obtained calling upon on Spencer to pay the defendants their costs, tended to shew that Spencer was the real plaintiff and not Hayward, and also an admission by the plaintiff's attorney "that the action was brought by and at the instance of the said George Spencer, and that the said Hayward was the nominal plaintiff only."

Lord Abinger stated that were they at liberty to consult equity and justice, they should probably make the rule absolute. He further pointed out that the authority of the Courts at Westminster is derived from the Queen's Writ, directing them to take cognisance of the suits mentioned in the writs respectively, and thus bringing the parties before them. This being so, they had no power to order any particular individual to come before them at their pleasure. In the absence of contempt or other special cause "we cannot make any order against an individual who is not party to any suit before us, nor has been guilty of any contempt, but merely because he has an interest in the event of the suit." He then points out the exceptional cases where the Courts have interfered in this way, referring to ejectment, which is a fictitious proceeding, and the Courts allow the action to be brought in the name of a nominal plaintiff, and allow the landlord to come in and defend, but they take notice of the real parties litigant. "These are the excepted cases, but the general rule is, that Courts of justice have no power except over parties to the record."

This case was followed in *Evans v. Rees* (1841), 2 Q. B. 334, 11 L. J. N. S. Q. B. 11, and cited in the judgment of the Judicial Committee in *Ram Coomar Coondoo v. Chunder Canto Mookerjee* (1876), 2 App. Cas. 186. Sir Montague Smith, who delivered the judgment of the Committee, referred to the Courts having ordered the real parties to pay

the costs in actions of ejectment, originally on the ground that that action was in form a fictitious proceeding, and having once assumed this power they had continued to exercise it in the actions substituted for that of ejectment. "Again, the Courts, it has been said, would so interfere in case of any contempt or abuse of their proceedings: see *Hayward v. Giffard*." The case was also referred to in the judgment of the Scottish case *Fraser v. Malloch*, 23 Rettie 619.

In *Hutchison v. Greenwood* (1854), 4 E. & B. 324, it was held that in ejectment, as well since The Common Law Procedure Act, 1852, as before, the Court has jurisdiction to order by rule the parties really conducting the defence to pay the costs of the plaintiff, though those parties are strangers to the record, and claim no interest in the property." Lord Campbell in this case says, at p. 326: "I cannot see that The Common Law Procedure Act, 1852, affects the question at all. The principle is that the individuals who order an appearance to be entered in ejectment, in the names of those not really defending the suit, abuse our process, and that, as they substantially are the suitors, we have jurisdiction to make them pay the costs." Erle, J., dissenting, was of opinion that the parties being strangers to the record, the Court had not this summary jurisdiction over them.

In *Evans v. Rees* (1841), 11 L. J. Q. B. 11, Wightman, J., referring to *Hayward v. Giffard*, states that all the cases cited in which this power has been exercised were ejectment; and that form of action is an exception to the general rule.

A case more nearly resembling the present is that of *Regina v. Greene* (1843), 4 Q. B. 646, (1842), 11 L. J. Q. B. 281. There it was held that where a rule nisi for quo warranto information is discharged, and it appears that the party making affidavit as relator is indigent and unable to pay costs, and was procured to make the application by another who is the real prosecutor, the Court will order the costs to be paid by the party so promoting the application. It makes no difference that such party was employed on the motion as an attorney. In this case *Hayward v. Giffard* was cited. It is true that the person ordered to pay the costs was a solicitor, but that was not the ground for the order for payment. Lord Denman, C.J. (4 Q. B., at p. 652), said: "The question is, whether a person who, on a motion for a quo warranto information, acts as an attorney, is on that account to avoid payment of costs, when he has, in fact,

been the relator, but has put forward another person in that capacity, who is unable to pay costs, I have no doubt that he is liable, where it appears that he is actually and virtually a relator."

In *Hearsey v. Pechell* (1839), 5 Bing. N. C. 466, Tindal, C.J., said: "The real question is, whether this is the action of the plaintiff, or substantially the action of Mr. Wood. If it were an action which the plaintiff would not have brought but for the instigation and countenance of Wood, the case would fall within *Tenant v. Brown* (1826), 5 B. & C. 208, and another case in the Court of King's Bench, where a master was compelled to pay costs for his servant, whom he had put forward as a defendant instead of himself. But it is clear to me that this is an action which the plaintiff would not have brought without instigation of Wood."

In 12 L. J. Q. B. 239, the case of *Regina v. Greene*, came before the Court, consisting of Denman, C.J., Patteson, J., Williams, J., and Wightman, J., in a subsequent application, when Lord Denman, said: "I am of opinion, upon the facts of this case, that a person in the situation of the attorney here, is not to avoid the payment of costs, when he is, in fact, the real relator, merely by putting forward another person, bearing that name, and who has complied with the general rule of Michaelmas term, 1839. Under such circumstances, the real party will be made to pay the costs."

I do not find that *Regina v. Greene*, has ever been overruled or questioned. It is, I think, an authority in an application of this kind to give costs against the party who is the real litigant, although his name does not appear as the applicant making the motion.

I agree with the Chancellor that under the Judicature Act there is now ample jurisdiction to deal with costs, full power being given to determine by whom and to what extent costs are to be paid; sec. 119; and in a case of this kind I am of opinion that where the real party litigant puts forward another person in whose name proceedings are taken that the Court has jurisdiction to impose costs against the real litigant. The appeal should be dismissed with costs.

HON. MR. JUSTICE LATCHFORD:—I agree.

HON. MR. JUSTICE MIDDLETON:—I think the judgment appealed from is clearly right. It is quite true that the jur-

isdiction of the Common Law Courts to award costs must in general be found in some statute, but it is equally a recognized exception to this general statement that the Common Law Courts always had power to award costs against one unsuccessfully invoking the aid of its process even when the Court had no jurisdiction to entertain the application. *Rex v Bennett* (1902), 4 O. L. R. 206; *Re Cosmopolitan Life Association* (1893), 15 P. R. 185; *In re Bombay Civil Fund Act* (1888), 40 Ch. D. 288. And the Court always had power to award costs against the real applicant when the motion was made by him in the name of a man of straw for the purpose of avoiding liability. The Courts were never so blind as to be unable to see through the flimsy device, nor so impotent as to be unable to act.

Regina v. Greene (1843), 4 Q. B. 646, has never been doubted. It determines: "Where a rule nisi for a quo warranto information is discharged, and it appears that the party making affidavit as relator is indigent, and unable to pay costs, and was procured to make the application by another who is the real prosecutor, the Court will order the costs to be paid by the party so promoting the application." This is a decision of Denman, C.J., and Patteson, Williams and Wightman, JJ. In Answer to the rule *Regina v. Thomas* (1837), 7 A. & E. 608; *Hayward v. Giffard*, 4 M. & W. 194, and *Regina v. Dodson* (1839), 9 A. & E. 704, were relied upon—and, in addition, it was urged that Simpson, to whom the rule had been addressed, was attorney for the relator, and was acting in discharge of his duty.

Lord Denman says: "The question is, whether a person who, on a motion for a quo warranto information, acts as an attorney, is on that account to avoid payment of costs, when he has, in fact, been the relator, but has put forward another person in that capacity, who is unable to pay costs. I have no doubt that he is liable, where it appears that he is actually and virtually a relator." This justifies the head-note, which proceeds: "It makes no difference that such party was employed on the motion as an attorney." In other words, the liability is not because he was attorney, but notwithstanding that he was attorney.

This case also shews that the liability may be enforced in a summary way.

Some question having arisen as to the material that should be read upon such an application a rule of Court was

promulgated in Easter Term, 1843, dealing with this question: "In every case in which the Court shall grant a rule . . . to compel any person, not a party to an original rule, to pay the costs of such original rule," etc. Thus in the year 1843 the Common Law Courts not only by decision, but by formal rule asserted the jurisdiction in question.

It is said with much force that the cases shew that the jurisdiction to award costs against a landlord who defended an ejectment action was always regarded as an exception to the general rule that the Court had no power save over parties to the record and that this exception was based upon the peculiar practice in ejectment. Undoubtedly this is said in so many words in *Hayward v. Giffard*, 4 M. & W. 194, but I can only regard *Regina v. Greene*, as a deliberate refusal to recognize this limitation to the general power of the Court.

In *Mobbs v. Vandenbrande* (1864), 33 L. J. Q. B. 177, a motion was made in an ejectment action to compel one Johnston, who had really brought the action in the name of Mobbs, to pay the defendant's costs. The motion was resisted upon the ground that the only exception to the general rule was in the case of defences in ejectment, and it was shewn that the Court had assumed jurisdiction over the landlord who defended in his tenant's name, because he was a party to the consent rule necessary under the old practice. This made the landlord quasi a party and conferred jurisdiction over him. It was said that Johnston not being a party to any such consent rule could not be made liable. Cockburn, C.J., says: "I certainly agree with Mr. Prideaux that the origin of the equitable jurisdiction as to costs, exercised by the Courts in the action of ejectment as distinguished from other actions, arose from the circumstance that persons, otherwise not parties on the record, were brought before the Court by being compelled to enter into the consent rule. And being thus within the jurisdiction of the Court, the Court could deal with them as to costs according to the equities of the case. But whether that be the origin of the jurisdiction or not, it has certainly been extended in practice beyond persons who have become parties to the consent rule. I think it a most useful and salutary jurisdiction, and one that we ought to exercise whenever the merits of the case require it." "It has been established by the dicta of learned Judges in one or two cases, that,

irrespective of being parties to the consent rule, when it is found that there is a real defendant or plaintiff behind, the Court will compel such person to pay costs." The *Queen v. Greene*, *supra*, was not cited, and the only cases considered seem to have been ejectment cases. Blackburn, J., after stating that the Court had jurisdiction by reason of the consent rule, adds: "But if the real parties had not entered into the consent rule, the Court had yet jurisdiction over them, on the ground, I suppose, that there had been an abuse of the process, or perhaps because the whole proceeding was the creation of the Court."

The fictitious character of the old action of ejectment was made absolute by the Act of 1852, and in this case as well as in *Hutchinson v. Greenwood*, 24 L. J. Q. B. 2, it was contended that the action, by the C. L. P. Act having ceased to have the peculiar character of the fictitious action devised by Chief Justice Rolls, this peculiar remedy was at an end. Lord Campbell, C.J., after stating that he had always regarded ejectment as an exception, in the end bases his judgment upon the general and wider right: "I do not think that the practice is contrary to general principle, because those who come into Court in another name and abuse the process of the Court, justly render themselves liable to pay costs as suitors. . . . With sincere respect for my brother Erle, who still, I believe, entertains a different opinion, I cannot entertain any doubt as to our jurisdiction to grant the present rule; and as it is not disputed here that the parties against whom the rule is sought to be made absolute are the persons who really caused the appearance to be entered and have defended the action by their own attorney, and though not the nominal, are really the substantial defendants against whom the plaintiffs have recovered a verdict, I think they are liable to pay the costs." Wightman, J., places the case upon the same broad general grounds: "According to the old rule of practice, recognized . . . by the authority of several cases, and founded upon very good reasons, a party who chooses to defend an action in the name of another, and for whose benefit the defence is really carried on, and who may in effect be considered as the real though not the nominal defendant, may be called upon by the plaintiff to pay the costs of the action." Erle, J., bases his dissenting judgment upon the precise ground relied upon by the appellant, that to order payment of costs by one who is not a party to

the record is contrary to principle. Singularly, *Regina v. Greene*, is not referred to in any way.

There is a dictum of Tindal, C.J., in *Hearsey v. Pechall* (1839), 8 L. J. C. P. 247, much in point: "When a party, for the purpose of trying a right, put forward his servant to exercise and act upon such assumed right, and consequently he, the servant, became the only defendant in an action of trespass, and the real principal stood by and gave assistance by means of his attorney; when, afterwards, the question of costs came to be decided, and the Court perceived that the party endeavoured to screen himself from the payment by putting forward his servant as a nominal defendant, they compelled him to pay the costs." In one of the contemporary reports the learned Chief Justice refers to this as "a case decided by the Queen's Bench."

The case of *Hayward v. Giffard*, contains in the judgment of Lord Abinger an expression not without significance: "In the present case, if it could have been shewn that Spencer had committed any contempt of Court, or been guilty, in respect of this suit, of anything in the nature of barratry or maintenance, it would have been another matter; but we cannot make any order against an individual who is not a party to any suit before us, nor has been guilty of any contempt, but merely because he has an interest in the event of the suit."

In this case it is not said that Hamilton "merely has an interest in the suit," it is said and shewn that it is his suit, and that he has been guilty of something in the nature of barratry and maintenance because desiring to try his own right he has procured this man of straw, to allow the litigation to be brought in his name. This as the cases shew is an abuse of the process of the Court, and I think a contempt of a most serious character, because the Court which is called into existence to administer justice is being used as a tool and instrument by which an injury is inflicted which, it is said, it can in no way redress.

In Chancery there never was any such limitation suggested as to the power of the Court over costs. The books contain many references as to the mode in which payment of costs may be enforced against persons not parties to the suit (e.g. *Sanger v. Gardiner*, C. P. Cooper, p. 262, *Attorney-General v. Skinners' Co. ib.*, p. 1), but singularly do not contain, so far as I can ascertain, any case in which the

foundation of that jurisdiction is discussed or the principles by which the discretion of the Court was governed.

Courts of Equity it is said have in all cases awarded costs "not from any authority, but from conscience and arbitrio boni viri." *Burford v. Lenthall* (1743), 2 Atk. 551. See also *Andrews v. Barnes*, 39 Ch. D. 133.

But quite apart from any consideration of the law and practice before the Judicature Act as now amended, I think that that Act makes our jurisdiction clear. In addition to the power originally conferred, which made all costs "in the discretion of the Court," the Court now has "full power to determine by whom and to what extent such costs are to be paid." These words were added to get rid of the restricted meaning attached to the words of the earlier Act in *In re Mills Estate* (1886), 34 Ch. D. 24, and the Court has since then declined to apply any narrow construction to the amending Act. *Re Fisher*, [1894] 1 Ch. 450; *Re Schmarr*, [1902] 1 Ch. 326; *Dartford Brewery Co. v. Mosely*, [1906] 1 K. B. 462. *Re Appleton French & Scrafton (Limited)*, [1905] 1 Ch. 749, is an instance in which the Court held that this statute enabled costs to be awarded to one not a party to the record. The power conferred by this statute is one which must be exercised upon principle and in accordance with those rules that govern the exercise of all judicial discretion and in no harsh and arbitrary manner, but where, even in the old cases, it is said justice and equity point to the propriety of an order in such cases as this, and the Court laments the absence of jurisdiction, there can be no reason, now that jurisdiction is conferred by the Act, why the Court should be slow to exercise it in proper cases. One is inclined to wonder at the timidity of some of the earlier Judges and to admire the robust sense and courage of Lord St. Leonards, who in a somewhat similar case (*Burke v. Lidwell* (1844), 1 Jo. & Lat. 703), after commenting upon the highly improper conduct of those who induced the pauper plaintiff "to allow his name to be made use of as the plaintiff in this suit for the fraudulent purpose of avoiding payment of costs," said: "Can there be a fraud which this Court ought to visit more strongly than the conduct pursued in this case in which to avoid the payment of costs of a doubtful litigation to which the plaintiff might be made liable the real plaintiff procures a pauper to become the nominal plaintiff . . . ?" What was there sought

was security for costs and it was argued that there was no power in the Court of Chancery to make such an order and no precedent for it, though that remedy was well known at law. "Then comes the question, have I the power to act in accordance with my opinion—it would be a reflection upon the administration of justice if I had not such a power—I am clearly of opinion that I have that power and I am prepared to exercise it and to make a precedent if none exist." Can it be doubted that Lord St. Leonards would have made the order now asked?

DIVISIONAL COURT.

JANUARY 12TH, 1912.

LAMOUREAUX v. SIMPSON.

Trustees—One Share in Jockey Club Held in Trust—Agreement to Re-transfer on Demand—Share Advanced Considerably in Value—Demand for Re-transfer—Refusal by Trustee—Jury Found in Favour of Plaintiff.

BRITTON, J., 20 O. W. R. 287, entered judgment ordering re-transfer and for amount received by trustee as dividends on share after demand for re-transfer.

DIVISIONAL COURT dismissed defendant's appeal with costs.

An appeal by the defendant from a judgment of HON. MR. JUSTICE BRITTON, 20 O. W. R. 287.

The appeal to Divisional Court was heard by HON. SIR JOHN BOYD, C., HON. MR. JUSTICE SUTHERLAND, and HON. MR. JUSTICE MIDDLETON.

C. J. Holman, K.C., for the defendant, appellant.

I. F. Hellmuth, K.C., and E. H. Ambrose, for the plaintiffs, respondents.

At the close of the argument

THEIR LORDSHIPS, V.V., dismissed the appeal with costs.

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HON. MR. JUSTICE SUTHERLAND. JANUARY 25TH, 1912.

CHEESEWORTH v. DAVISON.

Contract — Breach of Agreement — Syndicate to Operate Mining Claims in Alaska—Action for Damages, Account and Return of Money Paid—False Representations.

SUTHERLAND, J., dismissed action with costs, subject to certain deductions, in favour of plaintiff.

W. D. McPherson, K.C., for the plaintiff.

J. T. White, for the defendant.

HON. MR. JUSTICE SUTHERLAND:—Prior to the 8th May, 1903, the defendant had been engaged in mining operations in the Klondike and Alaskan districts and the plaintiff had been interested in speculating in mining properties.

One, John W. Cheeseworth, a brother of the plaintiff, and then living in Toronto, and the defendant, met in that city shortly before the said 8th May, 1903, and had a discussion about mining operations in the Yukon, during which the defendant told him that he had been up there and about the "strikes" that had been made and the prospects generally as to mining.

John W. Cheeseworth apparently interested the plaintiff and two other men named Henry G. Beecher and Henry H. Fryling, all three of whom were then living at Newark, N.J., with the result that a written agreement dated May 8th, 1903, was entered into between the plaintiff and the said three named other persons of the one part and Frank E. Davison, the defendant, of the other part, and which is in the following terms:—

"Whereas Frank E. Davison of Toronto, Canada, explorer, John W. Cheeseworth, of Toronto, Canada, broker, Henry G. Beecher of Newark, N.J., mining, Henry H. Fry-

ling of Newark, N.J., lawyer, and William L. Cheeseworth of Newark, N.J., merchant, propose to combine together a syndicate upon the terms and conditions hereinafter set forth for the purpose of locating, securing, taking up, testing, operating and otherwise handling placer mining claims and properties in Alaska and the Klondike districts; and

“Whereas said Davison proposes to represent the syndicate, as a member thereof, in locating, securing, taking up, testing, and operating such claims and properties, now therefore,

“We, the undersigned, being in consideration of our mutual promises and other good and valuable considerations, hereby agree as follows:—

“1. That said Davison shall receive from the other members of the syndicate \$600 within ten days from the date hereof to help meet grubstake expenses for the season of 1903 and in addition thereto shall receive \$500 to be forwarded to him at such post office address as he shall hereafter designate upon receipt by trustees or trustee of satisfactory reports of claims located and progress made by said Davison on behalf of the syndicate.

“2. That said Davison shall go to Alaska during the latter part of the current month, taking with him at least three trustworthy and competent men together with supplies and proceeded with the work of locating, securing, taking up and testing placer claims and properties as aforesaid in such manner and locations as he shall deem best for the syndicate; said claims and properties to be located, secured and taken up in the names of the syndicate including his own name and such other names as shall be furnished him by the syndicate and accompanied by proper powers of attorney, which claims and properties shall be the exclusive property of the syndicate; and he shall also take up claims in the names of such persons as shall accompany him on his expedition one-half of which latter claims shall be the exclusive property of the syndicate; and all properties and claims that the syndicate shall thus become entitled to shall be promptly transferred by proper assignment by said Davison to the said John W. Cheeseworth and Henry C. Beecher, and their survivor, as trustees for the syndicate which transfers and assignments shall be registered or recorded at the proper Government offices by said Davison as soon as possible and immediately forwarded to said trustees or trustee.

"3. That said Davison shall have 25% interest in the syndicate covering all of its properties, claims and holdings, and 25% of all interests in any wise invested in or belonging to said syndicate; and that the other 75% interest therein shall belong to and be divided between the other members of the syndicate, share and share alike.

"4. That in order to facilitate the taking up and holding of the titles of such claims and dividing the interests in the aforesaid proportions between the syndicate members, the New Jersey members of the syndicate are authorised to organise a close corporation in New Jersey or some other suitable State or territory of the United States, with such a capitalisation as they shall deem advisable, as soon as practicable and convenient, provided that one quarter or 25% of the capital stock of the said corporation be forthwith immediately transferred to said Davison, and the balance of three quarters or 75% be divided pro rata among the other members of the syndicate.

"5. That immediately after the formation of said corporation all of the claims and properties, and the titles thereto, then in possession of said trustees, or either of them, for the syndicate, shall be property transferred and assigned to said corporation, and such transfers and assignments be duly placed on record; and that thereafter all properties and claims to which the syndicate would have become entitled under this agreement shall be placed by proper transfers or assignments or otherwise in the name of said corporation.

"6. That said Davison shall devote his entire time, knowledge, energies and ability to furthering the interests of the syndicate in locating, securing, taking up, testing and operating claims and properties as aforesaid.

"7. This agreement shall remain in force for the term of one year from the date hereof, and shall be binding upon the heirs, executors, administrators and assigns of the parties hereto.

"In witness whereof the parties hereto have hereunto set their hands and seals in triplicate, this eighth day of May, 1903.

Sgd.	Frank Davison	(Seal)
"	John W. Cheeseworth	(Seal)
"	Henry C. Beecher	(Seal)
"	Henry H. Fryling	(Seal)
"	Wm. L. Cheeseworth	(Seal)"

There is no doubt upon the evidence that the defendant Davison was a practical miner of some experience at the time. He received from the defendants the sum of \$600 mentioned in the said agreement within a few days after its date, with the exception of \$100 which was either deducted therefrom by John W. Cheeseworth or paid thereout by the defendant Davison to him under circumstances which will be mentioned hereafter.

Shortly after this the defendant went to the Yukon. He remained there for the period of one year mentioned in the agreement during which it was to run and for some time longer.

On his return to Toronto in 1904 the defendant had a conversation with John W. Cheeseworth and learned that he and the other parties interested were dissatisfied. Nothing was done by them, however, until the 27th January, 1908, when the writ in this action was issued by the plaintiff.

On that day apparently he had obtained an assignment under seal from John W. Cheeseworth of his interest in the contract, and on the 3rd February assignments from Henry H. Fryling and H. C. Beecher of their respective interests.

A statement of claim was filed on the 25th February, 1908. It consisted of three paragraphs: The first descriptive of the parties, the second setting out the agreement in full, and the third the assignments from the other three parties to the plaintiff, and simply claiming (1) repayment of the sum of \$600 and interest and asking, (2) damages for breach of the terms of the said agreement, and in the alternative claiming an account from the defendant of all mining claims located by him, etc.

No allegations of fraud or misrepresentation were set out in the statement of claim as originally filed. The defendant filed a statement of defence in due course. Nearly two years then elapsed when the plaintiff desiring to amend his statement of claim made an application for that purpose, and on the 4th March, 1910, an order was made by Honourable Mr. Justice Clute permitting the amendments.

An appeal was taken from said order, and it was modified by the Divisional Court as follows: "And as a term of the amendment hereby permitted, it is further ordered that if the plaintiff shall by any amendment made under or pursuant to this order set up any new cause of action, as to

such new cause of action this action shall be deemed to have been brought on this day, and the defendant shall be entitled to the benefit of any defence based upon any statute of limitations as though the writ in respect of such new cause of action had been issued on this day."

As authorised by said order the plaintiff on the 24th March, 1910, made extensive amendments as set out in the amended statement of claim, alleging that in pursuance of said agreement the plaintiff located and secured certain placer mining claims and other claims in his own name contrary to the terms of the agreement, that the other parties thereto were induced to enter into the agreement by the misrepresentation and fraud of the defendant, that he had falsely and fraudulently represented "that he knew all about the Yukon and Klondike gold country and the various mining interests up there, and that he, the defendant, knew just where to go to find what he called 'the good things' in the mining section of that country, and that he knew where he could obtain mining claims immediately for the plaintiff and the syndicate members, that he would get an interest for the plaintiff and for the parties to the said agreement in what was known as the 'Ballaratt Creek claims' and that the defendant would locate, stake out and secure other claims for the plaintiff and the parties to the said agreement"; "that he would report back to the members of the said syndicate and the plaintiff, and that he would send the members of the said syndicate copies and plans shewing the location of claims staked by him together with a satisfactory report of each claim located, staked or secured, and that he, the defendant, would forward samples of gold taken from the claims, shewing the value of the same in the usual way, with a sworn declaration by himself or some other competent person attached to said report, and that he, the defendant, would devote his entire time, knowledge, energies and ability to further the interests of plaintiff and the syndicate in locating, securing, taking up, testing and operating claims and properties in the above agreement of the 8th day of May, 1903, for the period therein named, and that the defendant would transfer any mining property or properties located and taken up by him or by any person or persons in his behalf to the plaintiff, the members of the syndicate named in the agreement and to the trustees named in the said agreement" and that "the plaintiff and the par-

ties to the said agreement of the 8th day of May, 1903, had since discovered" that said representations and statements" were untrue and contrary to the facts, and were and are to the knowledge of the said defendant false, fraudulent and misleading;" and by claiming in his prayer for relief (3) damages for misrepresentation and fraud.

The defendant in his original statement of defence had pleaded that he had complied with the agreement, and that the parties thereto other than himself had failed to do so, whereby he was relieved from further performance thereof; that they had failed to supply him with money to take up claims staked by him in consequence of which he could not take them up and they were lost to the syndicate; that the \$600 in question had been expended by him under the agreement and accounted for; and that satisfactory reports of claims located and progress made were sent to Beecher, one of the trustees named in the agreement, and that no title to any lands required under the said agreement ever became vested in the defendant whereby the same could be transferred to the syndicate.

After the amendments to the statement of claim had been made on the part of the plaintiff, the defendant on the 27th May, 1910, amended his statement of defence by paragraphs denying all charges of fraud and misrepresentation and pleading the term already quoted as inserted in the order of Mr. Justice Clute by the Divisional Court and claiming that everything alleged in the said amendments and the plaintiff's cause of actions, if any, did not accrue within six years prior to the said order, in consequence of which the defendant would rely upon the Statute of Limitations.

The alleged misrepresentations and fraud of the defendant complained of by the plaintiff if ever made, were so made, on or before the date of the agreement in question, viz., the 8th May, 1903, and as the amendments to the statement of claim under which the allegations with reference thereto are set up were made on the 24th March, 1910, they were made beyond six years before the cause of action. Under these circumstances the defendant contends that by virtue of the Statute of Limitations the plaintiff fails on that portion of his case on which in the evidence at the trial he sought to lay most stress. But as I am disposing of the action in favour of the defendant on other grounds, I do not think it necessary to deal definitely with this branch of the case.

The plaintiff at the trial did not attempt to support with evidence or satisfactory evidence many of the allegations contained in his said amendments. The evidence of the defendant corroborated in some respects by evidence taken under commission at Vancouver, and in the Yukon district, disclosed that the defendant went to the Yukon as soon as he received the \$500 in question; that he hired three men, secured supplies and proceeded into the mining country for the purpose of locating claims; that he devoted his whole time and attention to the objects of the syndicate set out in the agreement; that he met with accidents and misfortunes by flood and fire, resulting in the destruction at one time of his outfit, and at another of some of his letters and papers; that he found the claim which he had in mind when he spoke to the other parties to the agreement before it was executed, staked when he got into the country; that he endeavoured to locate and did locate other claims as to which he communicated with members of the syndicate; that he wrote and sent letters, telegrams and reports under the contract in partial if not in complete compliance with its terms; that he spent some of his own money as well as the \$500 supplied to him by the other parties, in connection with his work; that for lack of money he was unable to register some of the claims which he located or which were located for him in the interests of the partnership by others, that he applied to his co-partners for moneys with which to locate them; that some of these claims subsequently turned out to be valuable, but were lost in consequence of the defendant not having the money to register them, and that on his return to Toronto, he reported to John W. Cheeseworth as to a certain claim located in the name of one Pike, and suggested that if the syndicate were to send in a miner's license Pike might give them \$500 for the share of the syndicate in that particular claim.

The plaintiff and his brother J. W. Cheeseworth deny that any proper reports were received on behalf of the members of the syndicate other than the defendant. Some of the communications received from Davison have been mislaid or destroyed and were not produced at the trial.

W. J. Cheeseworth testified that Davison said he had been to the Yukon and the Klondike for a number of years; had met with considerable success, but unfortunately a party came upon his claim and proved that he was the original

owner that had staked it, and he lost all that he had; that he had not sufficient funds to go back again, but if any person would stake him he knew just where to find a property, and there was no chance at all; it was a sure thing if he could only return to the Yukon; and on cross-examination he said that it was not a case of speculation—it was a sure thing. He knew just the spot to take the property out, and it was a big thing.

John W. Cheeseworth testified that the defendant had said that he knew where he could go and stake a claim or claims. He had positive knowledge of the claims being unstaked, and all he wanted was sufficient money to reach the Klondike to enable him to stake those claims which he would do and report back according to the agreement as soon as possible; and that he assured them there was no speculation about it at all. He knew the place and could go and stake the claim, asserting that there was no doubt about his knowledge of the country and not much doubt about the value of the claim. He considered it a very rich district and was confident the claim or claims would be valuable. These were the representations relied upon by the plaintiff at the trial. The defendant testified that he mentioned to the other members of the syndicate the prospects in the Yukon if locations could be obtained and mining operations carried on on a large scale; that they represented to him that they were in a position to supply considerable money to carry on large operations if necessary. He told them he had properties in view "on a workable creek," which he knew were open at the time the agreement was being entered into. He said he would go at once and try and locate and take up such properties; that he gave no exact descriptions of any property and no guarantee or undertaking that he would secure any; that when he went to the Yukon he found the claim had been staked, and reported this in one of his letters to the other members of the syndicate.

The plaintiff and the other parties interested put their agreement in writing. I have indicated what the plaintiff and his brother say as to the representations alleged to have been made by the defendant. No such representations are found in the agreement. I have indicated what the defendant says with reference thereto. We are, therefore, in this position; that an agreement put in writing by the parties and presumed to include the whole of the bargain is silent as

to such representations and that the plaintiff and defendant disagree in their evidence about them.

The plaintiff in his amendments alleges that the defendant spoke of knowing where "the good things" were. He spoke of getting an interest for the plaintiff and for the other parties to the said agreement in what is known as the "Ballaratt Creek" claims. He did not pretend at the trial that the representations as to these matters were made by the defendant before the agreement was entered into.

The plaintiff when examined for discovery testified that the contract contained all the terms of the agreement between the parties.

Under the circumstances and upon the evidence and documents and after the great lapse of time, I think it would be impossible for me to find that the contract is not as the parties intended it, or that the defendant made any false or fraudulent misrepresentations to induce the plaintiff and the parties thereto other than himself to enter into it. It is perhaps unfortunate that some of the communications which passed between the parties are not before the Court as they might aid in more fully clearing up the transaction. However, neither party is in a much better position than the other in this respect. The plaintiff admits that letters were sent to members of the syndicate other than the defendant by the latter which have been mislaid or destroyed, and the defendant testifies that certain communications received by him and all the papers that were in his possession were destroyed by accident or fire.

The defendant was not able to give a very exact or satisfactory account as to the dates and places of his work in the Yukon under the contract during the period covered by it. Probably this is not altogether strange after such a length of time. There were, however, two matters as to which considerable evidence was given at the trial and in reference to which his testimony was not altogether satisfactory. When the \$600 were being supplied to the defendant by the plaintiff and the other members of the syndicate it appears from the evidence of John W. Cheeseworth that the defendant had applied for a loan of money in connection with what was known as the Richardson Mine. Cheeseworth was at that time the president of the Mines Contract and Investigation Co. After looking into the matter that company decided not to make any advances to the defendant,

but charged him \$100 for their fee and expenses in connection therewith, and this was deducted from the \$500. Davison denied that he had made any application for a loan as indicated, but said that the \$100 came to be deducted because John W. Cheeseworth had said that there were certain expenses of Fryling's which would have to come out of it, amounting to \$100 and that he consented without much question.

The defendant also stated at the trial on his examination in chief that he had \$1,300 of his own money when starting for the Yukon after the agreement in question had been made, which he had received from his mother through property in which they were interested, on which a mortgage had been placed. It subsequently developed that he was considerably mistaken about how and when he received the said \$1,300. As to both of these matters his evidence was not very satisfactory. The plaintiffs were put to some trouble and expense in disputing his allegations as to these matters and for the purpose of effecting, if possible, his credibility with respect to the same. They succeeded to some extent although it is likely upon the whole evidence that the defendant was more or less confused about his dates in connection with these transactions.

Some of the evidence taken in the Yukon was of little or no relevancy to the matters in question in this case, and yet the cost of taking it must have been considerable.

I have come to the conclusion that I should dismiss the plaintiff's action with costs. I think I should limit to some extent the costs incurred in connection with the Yukon commission or commissions, and perhaps it would be fair to do so to the extent of one-half thereof. I think also that the sum of \$25 should be deducted from the plaintiff's costs to represent approximately the costs to which the plaintiff was put in connection with disputing the defendant's statements with reference to the \$100 and \$1,300 matters.

The action will, therefore, be dismissed with costs subject to said deductions.

HON. MR. JUSTICE SUTHERLAND. JANUARY 24TH, 1912.

HAMILTON v. VINEBERG.

Contract—Building Contract in Writing—Provide Materials and Perform all Work—Specifications for Dwelling House—Action for \$1,627.49 for Extras under Written Order of Architect.

SUTHERLAND, J., gave plaintiff judgment for amount less \$174 and with interest.

Counterclaim dismissed with costs.

E. C. Cattanach, for the plaintiffs.

H. Cassels, K.C., and R. S. Cassels, K.C., for defendant.

HON. MR. JUSTICE SUTHERLAND:—The plaintiffs, Elisha Hamilton and George Walker, trading as Hamilton & Walker, are builders and contractors and the defendant is a merchant. All three reside in Toronto. By an agreement in writing, dated 28th September, 1909, the plaintiffs, contractors, agreed to “provide all the materials and perform all the work mentioned in the specifications and shewn on the drawings prepared by D. Burnham, architect, for the owner” (the defendant) “for the erection and completion of a dwelling house on the easterly part of lot No. 13 on the east side of Simcoe street” in Toronto.

Clauses 2, 4, 6, 7, and 8, are as follows:—

“2. No alterations in or additions to the work shewn or described by the drawings and specifications shall be made except upon the written order of the said architect and when so made the value of the work added or omitted shall be added to or deducted from the contract-price. In case the parties hereto do not agree upon the value of the work added or omitted the same shall be fixed and ascertained by the said architect, whose decision shall be final and binding on the parties hereto.

“4. Should dispute arise between the parties as to whether the said work or materials fail to conform with the said drawings and specifications the same shall be settled by reference to the said architect, whose decision shall be final and binding on the parties hereto.

“6. The contractors shall complete the whole of the work comprehended under this agreement to the satisfaction of the said architect by the first day of March, 1910, when the said house shall be complete and ready for occupation, and

failing to do so they shall pay the owner the sum of \$25 for each week or part of a week elapsing thereafter until the said house is ready for occupation, such sum not to be a penalty, but as liquidated damages for non-completion by the date specified, which damages may be deducted by the owner out of any balance payable to the contractors herein.

“7. Should the contractors be obstructed or delayed in the prosecution or completion of their work by any act or default of the owner or by any damage which may happen by fire, lightning, earthquake, or tempest, or by the abandonment of the work by the employees of the contractors through no default of the contractors, then the time herein fixed for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all of the causes aforesaid, but no such allowance shall be made unless a claim therefor is presented in writing to the owner within twenty-four hours of the occurrence of such delay. Should the parties be unable to agree as to the time lost as aforesaid, the same shall be fixed by the said architect as hereinbefore provided.

“8. It is hereby mutually agreed between the parties that the sum to be paid by the owner to the contractors for the said work and materials shall be \$4,100 such sum to be paid as follows, that is to say: Eighty per cent. of the value of the work done and materials supplied during the two weeks preceding such payment, on the 1st and 15th days of each month from the date hereof until the said contract is completed, and the remaining twenty per cent. of the said contract-price in thirty-five days after the said house has been wholly completed. It shall be a condition precedent to the contractors' right to obtain any payment hereunder that they shall first produce to the owner the certificate of the said architect as to the value of any work done and materials supplied from time to time during the progress of the work herein contracted for, which certificates the architect shall issue on request on the several payment days herein mentioned.

If at any time there should be evidence of any lien or claim for which, if established, the owner of said premises might become liable and which is chargeable to the contractors, the owner shall have the right to retain out of any payment then due or thereafter to become due an amount sufficient to completely indemnify him against such lien or

claim. Should there prove to be any such claim after all payments are made the contractors shall refund to the owner all moneys that the latter may be compelled to pay in discharging any lien on the said premises made obligatory in consequence of the contractors' default."

The contractors entered upon the construction of the house under the terms of said contract and from time to time certificates were issued by the said architect Burnham, as follows:—

Certificate No. 1.	October 29th, 1909\$1,100 00
"	No. 2. November 12th, 1909	.. 300 00
"	No. 3. November 26th, 1909	.. 400 00
"	No. 4. December 13th, 1909	.. 200 00
"	No. 5. January 7th, 1910 500 00
"	No. 6. January 18th, 1910	... 480 00
"	No. 7. February 5th, 1910 325 00
"	No. 8. March 1st, 1910 500 00
"	No. 9. March 15th, 1910 150 00

On the 27th April, 1910, the architect issued a certificate in these words "Final certificate No. 10, Toronto, April 22nd, 1910. This certifies that Messrs. Hamilton and Walker, contractors, for dwelling for M. E. Vineberg, 129 Simcoe street, is entitled to a final payment of \$1,772.49 by terms of contract. D. B. Burnham, architect."

The plaintiffs admit that subsequent to the issue of such last-mentioned certificate they received two payments, which bring up the total of payments made to them by the defendant to the exact amount of the contract price, viz., \$4,100. It is admitted further that the house, apart from extras, is paid for, and that the plaintiffs' claim in this action is for extras alone. It is also admitted that on or about the 22nd March, 1910, the plaintiffs' contractors, assigned to the plaintiff Frank M. Gray the balance, if any, due to his co-plaintiffs, the contractors, as security for an advance of money made by him to them.

The claim of the plaintiffs, contractors, for extras, arises out of a written order as follows:

"Toronto, November 16th, 1909, Dear Sir: Whereas Mr. E. Vineberg, owner, did on the 26th of September, 1909, enter into an agreement with Hamilton & Walker, Builders, for the erection of a dwelling in accordance with drawings and specifications prepared therefor by D. Burnham, Architect, as fully set forth in such agreement, and whereas it is the

desire of said E. Vineberg, owner, to make certain changes as fully set forth as follows: The second floor to room fitted up enameled iron bath tub 5 ft. 0 in. long, enameled iron lavatory and low down closet complete, also set up where directed an enamel sink with back and drip board complete. and fit up any other rooms that owner may desire. Supply and put in window in bath room, also door and frame to rear balcony. Construct rear balcony with stair case from bottom to top floor, to have all necessary posts, rails, balusters, etc., required to make complete and strong job as may be directed. All work done as an extra where owner and contractor has not agreed on price before commencing said work, the contractors must keep an account of all materials and time spent on said work, so that price of said work may be given by the architect as per agreement. D. Burnham, architect."

There is some conflict of testimony as to this order. The architect Burnham was called on behalf of the plaintiffs and testified that the extras were required by the owner, the defendant. He wished to change the upper flat of the house in question and which in the original plan had three rooms so as to make it an apartment flat consisting of six or seven rooms, and with a stairway leading up to it and balcony not contemplated by said plan. The architect further testified that the plaintiff Hamilton and himself went over the matter together with the defendant, who pointed out the alterations which he desired and that they were ultimately carried out according to his wishes at the time. It was in consequence of these instructions from the defendant that the written order, exhibit 3, was prepared by the architect and handed to the contractors.

The architect also stated that the work was done by the plaintiffs to his satisfaction, and in a workmanlike manner as was the entire work of the construction of the house. He said that the alterations involved considerable extra work, some tearing down and removing, and the like. He said that he had prepared a plan and details for the construction of the stairway and railing, but apart from this no other new plan had been prepared at the time, nor any new specifications for the other extras. No estimate was prepared. He said that he went over the work in connection with the extras from time to time. He did not get particulars of exact quantities of material used in connection with them or the exact number

of hours of the labour employed upon them. He had a partial statement, exhibit 7, from Hamilton. He said, however, that as to the extras as a whole he went over the work carefully and fixed what he thought was a reasonable sum to allow for same.

It appears from his evidence also that the defendant was frequently at the house, almost daily, while the alterations were being done and knew that they were being done. He states that they were all authorized by him. He also states that his final certificate was issued in good faith, and having regard to the rights of both parties.

The writ in this action was issued on the 26th October, 1910; and the statement of claim filed and delivered on the 19th November, 1910.

The defendant filed a statement of defence and counterclaim and in the latter asked damages against the plaintiffs by original action and D. Burnham by counterclaim. Burnham, a defendant by counterclaim, applied to the Master in Chambers for an order striking out his name from the proceedings, and thereupon an order dated 24th December, 1910, was made granting leave to the defendant by original action to amend his counterclaim as he might be advised, and upon such amendment by making specific claim for damages against Burnham the said application to be dismissed. Appropriate amendments to the counterclaim were made by the defendant by original action pursuant to said order. Burnham thereupon filed a statement of defence and counterclaim.

The claim of the plaintiffs is for \$1,627.49, the amount of the extras referred to. The defendant in his statement of defence pleads that no alterations should be made except upon the written order of Burnham, to which the assent of both owner and contractor was to be attached.

I can see no justification in the contract for this latter plea, and if the evidence of the plaintiff and Hamilton is to be believed, and I do believe it, a verbal assent was given by the defendant to said order.

He also pleads that the whole of the work should be executed with the best and soundest of materials of their several kinds required and in the most substantial and workmanlike manner. Upon the whole evidence I think the materials and workmanship employed reasonably complied

with the terms and conditions of the contract and specifications, and that similar materials and workmanship were employed in the extras.

The defendant also pleads that the work was done negligently and improperly by the plaintiffs Hamilton & Walker with the connivance of Burnham. I find nothing in the evidence to justify this, and indeed the defendant on his examination for discovery practically abandoned this plea, or at all events could give no evidence to justify it.

The defendant also pleads the benefit of clause No. 6 of the contract and asks that as it provided that all the work should be completed by the 1st March, 1910, but it was not so completed until 10 weeks later, effect should be given to the penalty imposed by said clause and \$25 a day allowed to the defendant by way of deduction or counterclaim.

The defendant also pleads in par. 10 of his defence that the architect failed to act in connection with the contract with independent judgment or due skill, and that the plaintiffs, Hamilton & Walker, acting collusively with the said Burnham, procured him to issue in their favour the certificates referred to which they say were false to the knowledge of both Hamilton, Walker and Burnham.

I could not see anything in the demeanour of Hamilton or Burnham or which was otherwise disclosed at the trial which would justify this plea.

The defendant Burnham in his statement of defence and counterclaim after generally denying the allegations contained in the statement of defence and counterclaim of the defendant in so far as they related to him and charged any negligence or impropriety against him in connection with the contract in question, pleads that if the work under the contract was not completed within the time limited by it it was solely due to the fault and act of the defendant, Vineberg, in ordering alterations, variations and extras in and to the said plans and specifications, and that it was completed within a reasonable time thereafter.

The agreement between the defendant and the architect over the latter's compensation in connection with said contract is in writing and was for the sum of \$100. In his statement of defence and counterclaim the architect admits that he has received \$40 on account of said \$100, and claims payment of the balance of \$60. He makes also a further claim of 3 per cent. on the amount of the extras. I think the contract

does not permit of him claiming more than \$100. He is entitled to payment of the balance of \$60, but his further claim I do not allow.

While the defendant in one place says that he never gave any written authority to have the extras done nor any verbal authority and that he merely asked in the first instance what such proposed alterations or extras would cost, and getting no estimate nor satisfaction contented himself with simply protesting; it is apparent from his evidence that he was there frequently. He says that he was often there while the extras were being put in and said nothing about them while they were going in. It is admitted by the architect that he asked the plaintiff Hamilton for estimates of the extras from time to time, but was not furnished with these. Hamilton, however, says that the defendant was frequently interfering and suggesting alterations in connection with the extras which made it difficult for him to make any estimates, and so the work simply went on without him furnishing any.

The defendant is, of course, contradicted by both Hamilton and the architect as to ordering the alterations. He is contradicted by Hamilton as to giving directions from time to time about the repairs. He denies that any of the work which had been already done in the top storey had to be taken down for the purpose of making the alterations, and in this he is contradicted by the architect and by other evidence given at the trial.

On the whole, therefore, I have no doubt and I find that he did order the extras and that they were done as ordered. While it is true that the amount of them seems somewhat large having regard to the details in so far as they came out at the trial are concerned, and the contract price of the house, I think upon the evidence the work was well done, and that I must accept the testimony of the architect appointed by the owner himself and designated in the contract as the person to pass upon the matter, and his certificate as to same.

In the final certificate is included an item of \$174 in connection with a drain which was at first intended to go in one direction and was subsequently built in another direction. I do not think that under the contract and upon the evidence the plaintiffs are entitled to be paid this sum and it must therefore be deducted from the \$1,627.49.

The court has now heard all of the evidence in the case and has rendered its verdict. It is hereby ordered that the plaintiff recover of the defendant the sum of \$1,433.49, with interest from the 26th October, 1910, and costs. The defendant by counterclaim against the plaintiff will have judgment on his counterclaim against the plaintiff by original action for \$60 and costs. Counterclaim of the defendant by original action will be dismissed with costs.

MASTERS IN CHAMBERS.

JANUARY 10TH, 1912.

HON. MR. JUSTICE CLARKE IN CHIEF. JANUARY 25TH, 1912.

ONTARIO & WESTERN CO-OPERATIVE FRUIT CO.
v. HAMILTON, GRIMSBY & BEAMSVILLE R.W.
CO., AND CANADIAN PACIFIC R.W. CO., AND THE
ONTARIO & WESTERN CO-OPERATIVE FRUIT
CO. v. THE GRAND TRUNK R.W. CO.

Discovery. Motion for Further Examination of Manager of Plaintiff Company. Motion for Further Examination of Former Agent of Plaintiff Company. Motion for a Commission — Information taken in Affidavit and Reasonable Evidence as to Value of Truth. Plaintiff's Claim of Plaintiff's Claim. Ought to be within Knowledge of Plaintiff or their Agents. There should be Honest Examination on the Part of Plaintiff to Obtain the Information.

On the 10th instant order of Master in Chambers made on the 10th instant for further examination of McCallum and other witnesses and for a commission.

At the Court an order of the Master in Chambers

The motion in Chambers was for the examination of the witnesses named in the affidavit for discovery of the information taken in the affidavit and for a commission to be taken on the 10th instant for the purpose of obtaining the information.

At the Court an order of the Master in Chambers

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CARTWRIGHT, K.C. MASTER, (10th January, 1912):— It seems clear that the defendants, who are asked to pay in the second case over \$5,000 and in the first nearly \$3,000 for damages to the plaintiff's fruit by delay in transit and other defects alleged in the statement of claim, are entitled to know on what ground such large demands are made upon them. I would suggest if McCallum and Sutherland are now in Winnipeg that Griffin should first be examined as for discovery by the defendants and then if necessary be further examined by plaintiffs as a witness at the trial. If this is not acceptable then McCallum must be further examined either here or at Winnipeg after making application to Griffin and after that has been done Griffin can be examined by plaintiff. The costs of the motions will be in the cause.

Plaintiffs appealed from above order to

HON. MR. JUSTICE CLUTE IN CHAMBERS (25th January, 1912):—The question arose out of certain transactions in which the plaintiffs shipped fruit from Beamsville to Winnipeg, and an action was brought for damages for not shipping the fruit within the time agreed upon and for damages for loss of fruit for want of care on the part of the defendants.

Griffin entered into an agreement with the plaintiffs dated 6th of August, 1910, whereby he agreed to market for the plaintiffs shipments of fruit and vegetables during the season of 1910 to Winnipeg and points west. McAllum was examined for discovery and such examination being considered by the defendants insufficient, the application to the Master was made. The Master made an order (1) that the plaintiffs produce Griffin for discovery, or in the alternative that McAllum attend for further examination for discovery after having applied to Griffin for information touching the matters in question in the action, and (2) that after the examinations of Griffin or further examination of McAllum, the plaintiffs may issue a commission to examine witnesses.

It was contended on behalf of the plaintiffs that inasmuch as the arrangement between the plaintiffs and Griffin had expired and their accounts had been closed, the defendants had no right to have Griffin examined nor were

they entitled to call upon McAllum for further examination after he had obtained the information from Griffin.

Mr. Osler chiefly relied upon *Bolckow v. Ftsher*, 10 Q. B. D. 161, to support his contention that the plaintiffs were not bound to inquire from Griffin what the facts were in regard to the disposal of the fruit, nor were they entitled to examine Griffin for discovery. That was an action by cargo owners against the owner of a ship for a loss alleged to have arisen from negligence. The ship ran ashore and was stranded. An answer as to what was done by those on board with regard to such navigation at the time of the accident stated in substance, that the defendants were not on board at the time and had no knowledge or information respecting the matters inquired into, except as appeared by the protest of which the plaintiffs had had inspection. This answer was held insufficient as it did not appear that there was any difficulty in the defendants obtaining the required information from those who were in charge of the ship at the time of the accident. It was there held that a party to a cause is not excused from answering interrogatories relative to the question in issue on the ground that they are as to matters which are not within such party's own knowledge, but are only within the knowledge of his agents or servants, if derived in the ordinary course of their employment; and he is bound to obtain the information from such agents or servants, unless he shew that it would be unreasonable to require him to do so, as that, either such agents or servants have left his employment or it would occasion unreasonable expense or an unreasonable amount of detail or the like."

In the *Bolckow* case the servants were still in the employ of the defendants, and as I read the case it was not necessary and the Court did not decide that information which the defendants might obtain by the asking could not be obtained simply because the persons to be inquired of had ceased to be their servants. It might indeed be that such person would refuse to give the information because he had ceased to be in the defendants' employment, but if such information could reasonably be obtained after he ceased to be in such employment I can see no reason why it should not be obtained for the purpose of discovery.

In *Rasbotham v. Shropshire*, 24 Ch. D. 110, *Bolckow v. Fisher*, is referred to and North, J., points out that there are some cases in which a person interrogated would be

bound to say whether he had inquired of his agents. For instance, in a case where that which was done was obviously done by the servants and agents in the master's absence. He refers with approval to the judgment of Baggallay in that case where he says: "the practice in the Court of Chancery prior to the Judicature Acts was this, that where an act was done by an agent which the principal himself could not have done, the right to require information as to the acts of such agent was beyond all question."

It is said by Jessel, M.R., in *Anderson v. Bank of British Columbia*, 2 Ch. D. 645, that under the Judicature Act the right for discovery is regulated by the rules previously existing in the Court of Chancery. In that case, James, L.J., said at p. 657: "It is your duty in making the discovery to use your best efforts bona fide to obtain all the information that your agent can give you, and, whether it is before or after litigation, you ought to write to him, if necessary, and get from him the information; and if you get the information, you must tell us what it is, so that we may know the exact facts and circumstances of the case."

In *Earl of Glengall v. Fraser*, 2 Hare, 99, the Vice-Chancellor said: "The only question in this case is, whether the answer going only to the personal knowledge, information, and belief of the defendants is sufficient, or whether the defendants ought not to have ascertained, or made, at least, an attempt to ascertain, by inquiry of their late solicitors, what are the facts which are made the subject of charge and interrogatory." And after stating that the question of privilege did not necessarily arise, he says further: "The defendants are bound to give some information by their answer, or to say that they have made the attempt to procure it, but have failed." In this case it was shewn that the solicitors had ceased to act for the defendants for some seven years. The effect of this decision seems to be that it is not sufficient to say that his former solicitors or agents have ceased for several years since their transaction to be his agents and he does not know what communication or entries they have made, but as the head-note states if he has no personal knowledge of the facts he must at least shew that he has endeavoured to acquire the information from his agents in the transaction in question.

In the present case the information asked is relevant and reasonable. The damages claimed are by reason of the loss to the plaintiffs in having to sell the fruit at a less price than the fruit had in fact been sold for and rejected. To whom was it sold, and why was it rejected, and by whom? Questions of this kind, which form the basis of the plaintiffs' claim, ought to be within the knowledge of the plaintiffs or their agents who had charge of the transaction, and I cannot doubt that if the request was made Griffin would give such information as he had from his books and otherwise as to what took place in the transaction both as to the alleged prior sale and the subsequent disposition of the fruit. At all events, there should be an honest endeavour on the part of the plaintiffs to obtain this information.

The order made by the Master appears to me reasonable and within the recognized practice of the Court. The appeal is dismissed with costs.

DIVISIONAL COURT.

JANUARY 30TH, 1912.

YACKMAN v. JOHNSTON.

Limitation of Actions—Adverse Possession—Strip of Land 4 Feet Wide—Action to Recover Possession—Evidence that Land Had been Fenced in with Defendant's Lot—Motion for New Trial—Ground Surprise at Trial and Discovery of New Evidence — Affidavits not Sufficient—Absence of Diligence.

Plaintiff brought action to recover possession of a strip of land 4 feet in width between lots 31 and 30 in the town of North Bay, alleged to form a part of lot 31, but to which defendant, owner of lot 30, claimed title by possession, it having been fenced in as part of his lot. At the trial judgment was awarded plaintiff for recovery of the parcel in dispute, with costs. Defendant appealed to Divisional Court and also moved for a new trial on the ground of surprise at the trial and the discovery of new evidence.

DIVISIONAL COURT dismissed the appeal and motion with costs.

An appeal by the defendant from a judgment of the District Court of Nipissing, dated 30th November, 1911.

The appeal to Divisional Court was heard by HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B., HON. MR. JUSTICE BRITTON and HON. MR. JUSTICE RIDDELL.

F. Arnoldi, K.C., for the defendant.

G. H. Kilmer, K.C., contra.

HON. MR. JUSTICE RIDDELL:—The plaintiff is the owner of lot 31 on the north side of Second avenue in North Bay—the defendant of lot 30 adjoining to the west. A wire fence runs apparently dividing the properties, but the plaintiff claims that it is at the street line four feet in on his lot, and this is one of the disputes in the action—and the only dispute on the pleadings. But at the trial the Statute of Limitations was appealed to by the defendant, although no amendment of the pleadings was made or asked. The learned trial Judge, Judge Leask, found, and rightly found, that the plaintiff had the paper title and holding that adverse possession for the statutory period had not been proved, he gave judgment for the plaintiff. The defendant now appeals.

It cannot be successfully argued although it was urged that upon the evidence given at the trial, the learned Judge was not right; it is said also that the defendant was taken by surprise by the evidence of his witnesses, and especially his main witness Turcotte, and that material evidence could have been given by three persons named whose evidence it is said the defendant did not know of and could not with reasonable diligence have discovered before the trial.

At the trial the defendant swore that he had bought his lot in April, 1907, and that the fence was then in its present position—also that his house had been on the four feet in dispute and close against the fence, but he had moved it back gardening and planting flowers and shade trees on the strip. McLean, Johnston's vendor, swore that the fence was placed as the defendant said, when he sold and when he had bought the lot himself from Ferguson. Ferguson cannot fix this date accurately, but "it must have been in the latter part of the eighties." McLean was not asked, but the deed is produced and the date is actually 1903. Ferguson says there was an old fence, a poor fence, for a line fence at the time, but does not say whether it was placed as the present fence is nor for how long it had been so placed.

The defendant called Turcotte who had bought lot 30 from Ferguson before the McLean deal, and 17, 18 or 19 years ago. He swears there was no fence when he took possession at all, but that he built the fence which was on the premises when McLean took possession, or "it looks like the same fence"—he sold again to Ferguson about 12 years ago, never having got his deed.

At the time he built the fence there was no fence existing, but he found the surveyor's posts and laid his fence on the line so marked out, and this 17 or 18 years ago.

The learned Judge in giving judgment at the close of the trial, says: "The only possible evidence as to the adverse possession is that of Johnston himself, and that only extends back to a period of approximately five years, more exactly four years in April last. The location of this fence is not at all definitely fixed by any other witness, nor the period for which it was there.

Unless Turcotte was wrong when he said that he built his fence along the line of the surveyor's posts, or those surveyor's posts were incorrectly placed, it is evident that there must have been some alteration in the fence since its construction by Turcotte, as it is manifestly not now upon the proper dividing line between the two lots. When any such alteration was made does not appear, and the period during which Johnston or his predecessors were in adverse possession is anything but certain."

And that is the ground on which he proceeds.

The statement "The location of this fence is not at all definitely fixed by any other witness" (than the defendant) is susceptible of two interpretations—the learned Judge may have overlooked the very definite statement by McLean that the fence when he bought, which was some nine years ago (April, 1903), was in the present position—or the learned Judge may have taken this as a mild way of saying that he did not believe McLean although not contradicted. The former can hardly be the case, the evidence had been given but a few minutes before; and if the latter alternative is to be taken it would have been much more satisfactory if it had been stated in plain language.

But even so, the time runs back only to 1903, not sufficient for the defendant's purpose.

Ferguson cannot be definite—he says that he cannot remember how long the fence had been there when he sold to McLean—and the learned Judge was justified in holding that the defence had not been made out. Especially was this the case when Turcotte swore that the fence he built was on the surveyor's line which the present line plainly is not.

As to the application for a new trial it was put in the original notice of motion upon the ground of discovery of new evidence, but another notice was served setting up "surprise

at the trial by the evidence then given by the witnesses for the defence, and particularly by the evidence of the witness Turcotte, who had previously stated that his knowledge and recollection supported the defendant's title."

The solicitor swears that "Turcotte . . . departed from the statements he had made to me of his evidence as to the position of the fence in question, and as to the same being in position enclosing the four feet of land in question at the time McLean took possession. I had relied upon the said Turcotte to prove this fact." This exasperatingly loose statement is inexcusable—we are not told what Turcotte said or what the departure was—there is no doubt, no possible doubt, and no one contends there is any doubt "as to the position of the fence in question"—and no evidence of Turcotte can modify the finding in that regard. There is also no doubt—and no one contends there is—that this fence enclosed the four feet of land in question at the time McLean took possession. The only things Turcotte swore that could be a surprise were (1) that he put his fence on the surveyor's line—and no evidence is claimed to be available to contradict that, and (2) that he could not swear that the fence he built was the same as that when McLean took possession, though it looked to be the same. He never was even asked definitely about the position of the fence, the only important matter.

Then as to the other witnesses the solicitor with the same looseness swears: "I was also taken by surprise by the inability of other witnesses for the defence to state positively in the witness-box facts which I had previously understood in my instructions they would prove in the box." What these facts were, we are not told, nor what the witnesses said about them—and no solicitor would think of being satisfied with an "understood." He must have "understood" from the witnesses themselves and they must have given the instructions as the defendant himself swears "I never at any time deemed it necessary to procure evidence as to the fence in question." In the affidavit of the defendant there is the same inexcusable lack of definiteness as appears in that of the solicitor—and he does not shew any diligence in seeking for evidence although he swears in general terms to "all due diligence." The solicitor does not swear to any attempt at all, but says he relied upon the witnesses he adduced.

It must have been perfectly apparent from the beginning that the defendant must rely upon the Statute of Limitations,

the plaintiff had had a survey made and then attempted to take possession of the strip in dispute, and the defendant refused to give up possession: the plaintiff pulled down the existing fence and built it on the surveyor's line and the defendant replaced it. At the trial no attempt was made to shew that the survey made was at all incorrect, the surveyor was not even cross-examined—the whole defence was based upon the fence and possession up to the fence. That even now must be the whole defence.

This being so the defendant swears that he never at any time deemed it necessary to procure evidence as to the fence in question—and it is perfectly plain that he did not look for any such witnesses; the solicitor does not pretend that he did, all he seems to have done was to “understand” something from those who were brought to him.

The only evidence intended to be adduced if a new trial be granted is that of persons who can (as they say) swear to the fence. There was no such diligence to obtain this evidence as would justify us in acceding to the motion.

It cannot be necessary to cite authorities, but the following may prove of interest: *Robinson v. Rapelje*, 4 U. C. R. 289; *Murray v. C. C. R. Co.*, 7 A. R. 646; *Trumble v. Horton*, 22 A. R. 51; *Caswell v. Toronto R. Co.*, 19 O. W. 8. 784.

The motion should be dismissed with costs.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B., and
HON. MR. JUSTICE BRITTON:—We agree in the result.

HON. MR. JUSTICE CLUTE.

JANUARY 25TH, 1912.

RE SHATTUCK.

Will—Construction—Devise—Life Estate—Remainder given to Sons in Equal Shares — Vested Estates or Interest in Lands which Passed by Will to Executors—Costs out of Estate.

An application by the executors, for the construction of the will of the late Joseph E. Shattuck.

W. C. Brown, for the executors.

V. A. Sinclair, for S. Shattuck, William J. Shattuck, and the executors of Elmer L. Shattuck.

W. M. Douglas K.C., for Lorenzo Shattuck, and Edgar Marshall Shattuck.

HON. MR. JUSTICE CLUTE:—The testator after directing his executors to pay his debts proceeds as follows: "I give to my wife, Margaret, all my real and personal estate as long as she remains my widow (describing it). In case of my wife's death or marrying again I wish my lands to be sold and also my personal property and the proceeds to be equally divided between my younger sons, Angus Lorenzo Shattuck, Edgar Marshall, Noah Safford, Elmer Lincoln, and William Joseph Shattuck."

The widow, without having married, died on the 4th of December, 1911. Elmer Lincoln Shattuck did not marry and died in July, 1903, leaving a will, whereby he devised his estate to certain heirs. The following questions are submitted:

1. Does the wording of the will grant a life estate to the wife with remainder over at her death or re-marriage to the five children, younger sons, in equal shares so that each of the said sons upon the death of the testator took a vested interest in the said lands?

2. Did the interest of Elmer Lincoln Shattuck lapse upon his death or did it pass under the will of Elmer Lincoln Shattuck, deceased, to his executors?

3. Did Elmer Lincoln Shattuck during his lifetime have a vested interest in the estate of the said Joseph E. Shattuck?

It will be seen that in this will there is no gift over. It is clear, I think, that the intention of the testator was to make a gift to his children. The possession of the gift is delayed by keeping out a life estate for the widow, and upon her death or re-marriage the real and personal estate is to be sold and divided between the five children. This brings the case, I think, within the rule laid down in *Packham v. Gregory*, 4 Hare 396, where Sir James Wigram, V.-C., said: "But if, upon the whole will, it appears that the future gift is only postponed to let in some other interest, or, as the Court has commonly expressed it, for benefit of the estate, the same reasoning has never been applied to the case. The interest is vested notwithstanding, although the enjoyment is postponed." See also *Jarman on Wills*, 6th ed., p. 1404; *Rogers v. Carmichael*, 21 O. R. 658. In this last case there was also a devise and bequest of real and personal estate to the wife for life or until marriage, with power of disposal, and by a residuary clause devised the residue not specifically devised or bequeathed and not sold or disposed

of by his wife immediately after her death or marriage to his executors to sell and convert the same into money and out of the proceeds pay a specific sum to each of his five sons and divide balance, share and share alike, between his three daughters. One of the sons died prior to the widow, leaving no issue, and it was held that the legacy to him became vested on the testator's death, payable on the widow's death, and that his personal representatives were entitled thereto. So in *Town v. Borden*, 1 O. R. 327, where a testator by his will gave to his wife the use of his personal property and his farm for the support of his children "and at her decease the whole of the personal and real property to be equally divided between my six children," it was held that the shares of the children vested on the death of the testator. In this case reference is made to *Baird v. Baird*, 26 Grant 367, referred to by Mr. Douglas, and Proudfoot, J., points out that the report in the Baird case it is defective. In that case an apportionment of each was to be made "to each of our children alive at the time," etc., which, of course, precluded the vesting of their interest at the time of the testator's death.

In *Webster v. Leys*, 28 Grant 475, it was held by Proudfoot, V.-C., that a bequest in the form of a direction to pay or to pay and divide at a future period vests immediately if the payment be postponed for the convenience of the estate or to let in some other interest.

Theobald on Wills, Canadian edition, gives the rule in these words, at p. 584: "If the postponement of division or payment is merely on account of the position of the property, if, for instance, there is a prior gift for life, or a bequest to trustees to pay debts, and a direction to pay upon the decease of the legatee for life, or after payment of the debts, the gift in remainder vests at once. But where the payment is deferred for reasons personal to the legatee, the gift will not vest till the appointed time." See also *Martin v. Grant*, 15 Grant 114; *Kirby v. Bangs*, 27 A. R. 17.

I think in this case the gift of the testator, Joseph E. Shattuck, to his five sons vested upon his death and that Elmer Lincoln Shattuck during his lifetime had a vested interest which passed by his will to his executors. Costs of all parties out of the estate.

HON. MR. JUSTICE KELLY.

JANUARY 25TH, 1912.

LABONTE v. NORTH AMERICAN LIFE ASSURANCE
COMPANY.

*Insurance—Life—Action on Policy—Semi-tontine Investment Plan—
Surrender Value of Policy—Election by Insured at End of Term
—Evidence.*

KELLY, J., dismissed plaintiffs' claim with costs, and directed defendants to pay to plaintiff \$642.70, less their taxed costs, declaring that this amount satisfied the policy.

Action to recover upon a policy of life insurance.
Tried at North Bay non-jury sittings, December 12th, 1911.

W. F. MacPhie, for the plaintiff.

J. A. Paterson, K.C., for the defendants.

HON. MR. JUSTICE KELLY:—The defendants issued a policy of insurance, dated October 21st, 1890, on the life of plaintiff, Pierre Labonte, on the defendants' semi-tontine investment plan, and in consideration (amongst others) of the annual premium of \$29.65 payable on delivery of the policy and thereafter on October 20th in every year for nineteen years, insured the life of the plaintiff, Pierre Labonte, and therein promised to pay to his wife, Zelia Mahen, "should his death occur within the tontine period hereof, otherwise to himself, his executors, administrators or assigns, the sum of one thousand dollars, first deducting therefrom the balance of the current year's premium, if any, and all loans on account of this policy, upon satisfactory proof at its head office, of the death of the insured during the continuance of this policy and its surrender with the last renewal receipt thereof," under the provisions contained in the policy.

It was also set forth in the policy that it "is issued and accepted under the company's semi-tontine dividend plan upon the following special provisions printed and written and also those on the back hereof, all of which are hereby incorporated herein and made part hereof." One of these provisions was that the tontine dividend period of the policy would be completed on the 20th day of October, 1910, and that upon completion of that period, provided that the policy should not have been terminated previously by surrender, lapse or death, the legal holder or holders of the

policy should have certain options upon its then surrender, one of which options was to withdraw in cash the policy's entire share of the assets, that is the accumulated reserve fixed by the policy at \$465.70, and in addition thereto the surplus apportioned by defendants to the policy.

On September 22nd, 1910, a representative of the defendants wrote to plaintiff, Pierre Labonte, transmitting to him a form setting forth various options which the legal holders of the policy had the right to choose from on the completion of the tontine dividend period on October 30th, 1910, and asking the plaintiff to signify the options selected, so that the necessary voucher might be forwarded.

One of the options set forth in the form was "No. 4," that the policy might be surrendered for its entire cash value, comprising surplus and reserve, and amounting to \$642.70.

The plaintiffs by writing under seal, dated October 3rd, 1910, which was transmitted to and received by defendants, signified that, after carefully considering the various options offered them, they had decided to take that numbered 4 (namely, surrender the policy and accept its entire cash value, \$642.70).

On October 28th, 1910, defendants sent to plaintiff, Pierre Labonte, a form of discharge to be signed by him and the beneficiary in accordance with the option so chosen by the plaintiffs. In reply, the plaintiff Pierre Labonte wrote to defendants on October 31st, 1910, stating that the amount which he had chosen to accept was \$662.70, and not \$642.70, and asking defendants to look over the matter. On receipt of this letter defendants, to convince the plaintiff, Pierre Labonte, wrote him on November 3rd, 1910, returning to him for inspection the option form which had been signed by the plaintiffs, and requested that it be returned to defendants with the discharge and policy when defendants' cheque for the proceeds would be immediately mailed to him.

The option form was not returned to defendants, nor was the policy surrendered to defendants, both of these documents having remained in the possession of the plaintiffs and being produced by them at the trial. Plaintiffs did not further communicate with defendants but commenced this action claiming that by the terms of the policy they are entitled to payment of \$1,000.

Having regard to all the terms of the policy, I find that what plaintiffs were entitled to at the end of the twenty years dividend period, namely, on October 20th, 1910, was not \$1,000 but one or other of the options mentioned in the policy; that plaintiffs chose to accept the option which entitled them to the cash surrender value of the policy at that time, and which was stated by defendants and admitted in writing by plaintiffs to be \$642.70 on surrender of the policy. Not only did the plaintiffs choose to accept the \$642.70 but the evidence shews that, under the terms of the policy or contract of insurance in question, this sum is the amount which an annual premium of \$29.65 for twenty years produced or purchased as the surrender value at the end of that time of a policy on the plan and terms of that in question here and having regard to age, &c., of the insured.

The defendants have been ready and willing to pay the holders of the policy the cash surrender value thereof, \$642.70, on compliance by the plaintiffs with the conditions of the policy; I therefore dismiss the plaintiffs' claim with costs, and I direct that on payment by the defendants to the plaintiffs, or if plaintiffs refuse to accept it then into Court, of six hundred and forty-two dollars and seventy cents, less their taxed costs, the policy be declared satisfied and be delivered to the defendants; and that in the meantime the policy remain in Court.

HON. MR. JUSTICE RIDDELL.

JANUARY 30TH, 1912.

RE SWAYZIE.

Will—Construction—Motion under Con. Rule 938—Maintenance of Widow—Death of Widow—Corpus of Estate—Income—Debts—Religious Society—Identification—Residuary Clause in Nugatory—Nothing left Undisposed of—Funeral Expenses not Maintenance.

Motion by the executors for an order under Consolidated Rule 938 construing the will of the late William Swayzie.

S. Casey Wood, for the executors.

E. C. Cattnach, for the Official Guardian.

George Kew, for the Methodist Church.

HON. MR. JUSTICE RIDDELL:—The testator made his will, 1903, whereby after revoking all former wills, &c., and directing his debts to be paid, he made the following provisions.

“1st. I give, devise and bequeath all my real and personal estate of which I may die possessed in the manner following, that is to say: I give, devise and bequeath to my wife Sarah Swayzie all my real and personal effects also my money, mortgages, bank accounts, notes or any other real and personal effects that I may die possessed of (sic) for her sole and only use forever, subject nevertheless to the consent and advice of my executors hereinafter named.

2nd. My will is further: If the interest on my real and personal effects be not sufficient for the maintenance of my wife Sarah Swayzie then I instruct my executors to take sufficient of the principal money to meet her needs.

3rd. After the decease of my wife Sarah Swayzie, all the residue of my estate not hereinbefore disposed of I give, devise and bequeath unto the King street Methodist Church of Ingersoll to be held by the said King street Methodist Church in trust to be disposed of as follows: The proceeds to be paid, expended and applied for the benefit of the Woman's Home Missionary Society of the King street Church, Ingersoll, and for no other purpose only for home missions exclusively, my executors to co-operate with the Woman's Home Missions of King street Church, Ingersoll, to assist said Woman's Home Missionary Society to divide said proceeds.

4th. Should it be deemed necessary to sell the house and lot on King street west before the decease of my wife, my executors hereinafter named may determine.

I give, devise and bequeath all my household furniture and wearing apparel, bedding and so forth to my wife for her sole and only use forever.

All the residue of my estate not hereinbefore disposed of I give, devise and bequeath unto my wife Sarah Swayzie.

And I nominate and appoint my wife Sarah Swayzie my executrix and N. H. Bartley, of Ingersoll, my executor of this my last will and testament.”

N. H. B. has been relieved of the trust and R. T. Agar appointed in his stead.

Sarah Swayzie died 19th January, 1912, intestate, leaving heirs and next of kin.

There is on hand in the estate \$3,382.39.

Cash on hand	\$ 869 19
Real estate	1,000 00
Chattels	200 00
Securities, notes and interest	1,313 20
	<hr/>
	\$3,382 39

A motion is made to determine the meaning of the will and its effect. I ordered the Official Guardian to represent all heirs and next of kin.

Bearing in mind the two rules for the interpretation of a will of moment upon their enquiry, I do not think there is any real difficulty although it was quite proper to ask a judicial interpretation. The two rules referred to are: 1. Where two clauses in a will are contradictory and inconsistent, the latter *prima facie* prevails; and 2. The will should be read as a whole and effect should be given so far as possible to all parts thereof.

It is plain that the clause giving the "household furniture and wearing apparel, bedding and so forth" to the wife, is to be given full effect to, the "and so forth" referring to the beds, &c., used with or as part of the property specifically bequeathed. These, then, belong to Sarah Swayzie's estate.

Then clause 1 is modified by clauses 2 and 3, the last part of clause 2 shews that the executors are really to have the management of the estate.

The effect of these three clauses is that Sarah Swayzie is to have her maintenance out of the whole estate for her lifetime, and if the revenue should not be sufficient for that purpose, the corpus was to be cut in upon. But after her death everything was to go to the society except the articles spoken of later in the will.

The residuary clause is, of course, nugatory, there being nothing left undisposed of.

Then as to the debts of Sarah Swayzie, it is obvious that if the estate did not furnish her sufficient to pay her way, the amount of the debts she incurred for maintenance must be paid to her estate as being maintenance.

Funeral expenses are not maintenance, these must be paid for out of her own estate, not out of the estate of her deceased husband.

It appears that there is no such society as "the Woman's Home Missionary Society of the King street Church,

Ingersoll," but there is a Women's Missionary Society of the Methodist Church and this society has an "Auxiliary" in the King street Methodist Church, Ingersoll. This "auxiliary" is the society meant, and the executor has both the right and the duty of assisting the auxiliary to divide the bequest. Costs out of the estate.

Order accordingly.

SUPREME COURT OF CANADA.

DECEMBER, 1911.

EWAN MACKENZIE v. MONARCH LIFE ASSURANCE
COMPANY.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Company—Issue of Shares—Authority to Sign Certificate—Estoppel—Evidence.

SUPREME COURT OF CANADA held, per FITZPATRICK, C.J., and DUFF, J., that where by statute and the by-laws of a joint stock company, certain of its officers are empowered to sign stock certificates a certificate under seal signed by such officers in favour of a person who has agreed to change his position on receipt of the shares it represents and who is declared therein to be the holder of such shares, the company is estopped from denying that it was issued by its authority even if one of the officers signing it was acting fraudulently for his own purposes in doing so.

Held, per ANGLIN, J., that the certificate is only *prima facie* evidence of the statements therein and such evidence may be rebutted by shewing that it was issued without authority. In this case, however, DAVIES and IDINGTON, JJ., *contra*, the company failed to make such proof.

Judgment of the Court of Appeal, 18 O. W. R. 325, 23 O. L. R. 342, reversed, DAVIES and IDINGTON, JJ., dissenting.

An appeal by the plaintiff from a decision of the Court of Appeal for Ontario, 18 O. W. R. 325; 23 O. L. R. 342, affirming a judgment of HON. MR. JUSTICE RIDDELL, 16 O. W. R. 933, in favour of the defendants.

In the year 1905 the appellant was part owner with one Ostrom of certain interim copyrights for six forms of insurance policies. The Monarch Life Assurance Company advertised that they were the exclusive owners of these forms. On the 7th September, 1905, the assurance company not having paid for the said copyrights, the appellant instituted proceedings against the said Ostrom and the assurance company claiming an injunction restraining the company from publishing the said advertisements, and the sum of \$5,000

damages. This action came on for trial before the HON. MR. JUSTICE CLUTE, and after the case had been partially tried was adjourned to enable the parties to effect a settlement. After considerable negotiations and correspondence it was agreed that Mackenzie should receive 25 fully paid up shares of the capital stock of the Monarch Life Assurance Company, and should transfer his interests in the copyrights to Ostrom, the manager of the company, and the action against both parties should be dismissed without costs. This settlement was arranged by Senator J. K. Kerr, apparently acting for the company, and by Mr. D. C. Ross, apparently acting for T. Marshall Ostrom, the managing director of the company. A certificate representing the stock, issued under the corporate seal of the company and signed by its proper officers, was handed over and the action was dismissed.

The company then repudiated the certificate and denied that the plaintiff was the owner of any shares, and this action was brought to compel the company to register the plaintiff as owner of the 25 shares. The case came on for trial before the HON. MR. JUSTICE RIDDELL, at Toronto, who after the conclusion of the evidence, stated that the facts appeared to be as follows:--

1. That Senator J. K. Kerr represented that he was acting for the company.
2. Every one acted in good faith.
3. Mr. Wilson, the company's solicitor, knew the terms of the proposed settlement.
4. The company received consideration for the shares.
5. That there was no resolution approving of the settlement of the action or the issue of these shares.

His Lordship subsequently dismissed the action upon the ground that the settlement was made with Ostrom acting on his own behalf and that the company were not bound by his actions in so doing. An appeal was taken from the said judgment to the Court of Appeal for Ontario and was dismissed with costs upon the same grounds, the HON. MR. JUSTICE MAGEE dissenting. From this judgment the appellant appeals to the Supreme Court of Canada.

The appeal to the Supreme Court of Canada was heard by HON. SIR CHARLES FITZPATRICK, C.J.C., HON. MR. JUSTICE SIR LOUIS DAVIES, HON. MR. JUSTICE IDINGTON, HON. MR. JUSTICE DUFF, and HON. MR. JUSTICE ANGLIN.

Bain, K.C., and Gordon, for the appellant.

The authorized officers having signed the certificates bearing the company's seal the company is bound by their act. Halsbury's Laws of England, vol. 5, p. 294. *Royal British Bank v. Turquand*, 5 E. & B. 246; *In re Land Credit Co.*, 4 Ch. App. 461.

In *Ruben v. Great Fingal* [1904] 2 K. B. 712, the certificate was not signed by the proper officers, but was forged and the company were held not liable. The remarks of their Lordships, however, support the position of the appellant in this case. And see also *Bloomenthal v. Ford*, [1897] A. C. 156; *Duck v. Turner*, [1901] 2 K. B. 304; *In re Coasters*, [1911] 1 Ch. 86; *McKain v. Canada Birkbeck*, 7 Ont. L. R. 247.

The onus was on the company to prove facts sufficient to defeat plaintiff's claim; *D'Arcy v. Turner*, L. R. 2 Ex. 158; *County of Gloucester Bank v. Ruddy*, [1905] 1 Ch. 623; *In re Hamilton Land Co.*, [1896] 2 Ch. 743; and they have not done so.

Matthew Wilson, K.C., for the respondents.

Ostrom, the managing director, had no shares of his own to transfer to the plaintiff and no authority to issue the certificate. *Whitechurch v. Caranagh*, [1902] A. C. 117; *Ruben v. Great Fingal Consolidated Co.*, [1906] A. C. 439.

The company never, by resolution, by-law or otherwise, authorized the issue of this certificate and cannot, even as a trading corporation, be estopped from denying its validity. *Longman v. Bath Electric Tramways*, [1905] 1 Ch. 644; *Company of Merchants of Staples v. Bank of England*, 21 Q. B. D. 160.

HON. SIR CHARLES FITZPATRICK, C.J.C.:—I concur in the opinion of Mr. Justice Duff.

HON. SIR LOUIS DAVIES, J. (*dissenting*):—For the reasons given by the Chief Justice of Ontario in dismissing the appeal in this case to the Appeal Court of Ontario, from the judgment of the trial Judge, Riddell, J., in which reasons Garrow and Maclaren, J.J.A., concurred, and also for the reasons stated by Meredith, J.A., which substantially agree with those given by the Chief Justice and to which I do not desire to add anything, I would dismiss this appeal with costs.

HON. MR. JUSTICE IDINGTON (*dissenting*):—The appellant sues for a declaration that he is the holder of 25 fully paid-up shares in respondent company and to have it ordered to register him as such.

On the facts set out by the learned trial Judge and again more fully by the Chief Justice of Ontario in the Court of Appeal, which are not disputed, it is clear that in law there never was any subscription for such shares or allotment or other issue thereof by the only authority competent to so direct.

It is admitted by the appellant he never paid the company anything nor had any contract with the company which would enable its board of directors to issue paid-up stock, even if we could assume it competent for the company to so contract.

He contends such a bargain is possible and that in course of executing it the managing director and the vice-president of the company would be the proper officers by force of the Act of Incorporation and the parts of the "Companies' Clauses Act" included thereby in such Act, and of the by-laws made thereunder to issue such certificate as this action is founded upon.

The certificate is as follows:—

This certifies that Ewan Mackenzie is the owner of twenty-five fully paid-up shares of the capital stock of the Monarch Life Assurance Company (upon which shares \$2,500 has been paid, together with \$625 on premium) transferable only on the books of the corporation by the holder hereof in person or by the attorney upon surrender of this certificate properly endorsed and with the consent of the directors.

In witness whereof the said corporation has caused this certificate to be signed by its duly authorised officers and to be sealed with the seal of the corporation this 3rd day of May, A.D. 1906.

(Seal)

T. H. GRAHAM,

First Vice-President.

T. MARSHALL OSTROM,

Managing Director.

He says this was issued to him under such facts and circumstances as to induce him to rely thereupon and accept it in settlement of an action brought against the man Ostrom, who signed, and the company, and that he so induced, and so relying, consented to the dismissal of his action and

therefore the company is estopped from denying the validity of the certificate.

I will assume that his present action is so constituted that even if there were no shares available either existent or within the power of the company to create to answer his demand, he, if entitled to recover at all, might recover alternatively damages for the failure to do so.

I desire his claim should be presented in the broadest possible way it can be put, in order to give effect to this alleged estoppel, if it can exist, and then examine the facts on which it is alleged to rest. But presently therewith I must also examine the power of the company to issue such shares and consider the bearing thereof on said facts.

The action (of which the dismissal is the basis of any right appellant can have herein) was brought to enforce as against Ostrom a contract one Stevenson had made with him to sell some copyrights to him for a large consideration of which shares in the company formed a part, and to have the company restrained from using the copyrights. The one-fourth of the rights acquired by Stevenson, the vendor of said copyrights, had passed to appellant. The purpose of both was to have the company acquire said copyrights.

In his statement of claim therein, appellant alleged that the company by virtue of the contract with Ostrom and the latter's dealings with his company, had used said copyrights, but had not implemented the bargain.

This was answered by the company denying the allegations, and amongst other things pointing out that it had never become organized and hence such a bargain was in law impossible for provisional directors to make.

The company had in fact, up to the trial, never been organized, and its provisional directors clearly had no power to do aught but get shareholders to subscribe upon a basis that could not extend to include as part of the considerations moving to subscription a contract binding it to acquire and use such copyrights or anything of that nature.

As against the company, save possibly the right to enjoin it from using or bargaining for use of such copyrights, the action seemed as hopeless a thing as ever was presented to any Court.

And there is no evidence that at any time after said action was entered for trial the company ever did anything that would have touched appellant's rights in that regard. if he had any.

The trial was postponed from February, when first opened, to be taken some later day if not settled.

The company got itself organised on the 21st of March, following this.

The appellant must have known from the company's pleadings and due consideration thereof, that the foundation in law for any bargain of which the fruits were to be shares in the company, did not exist. He must, therefore, when thus put upon inquiry, be held bound to act cautiously and reasonably in relation to any proffered arrangement that implied carrying out what was illegal and improper for this man Ostrom to have attempted. He ought to have realised that before he could reckon upon shares in the company coming through such a channel, he must see that they were duly and regularly issued.

But it has been assumed by appellant that even conceding the power of the provisional board doubtful, once the company became organised, it could issue paid-up shares as result of a bargain such as in question. It seemed also to be assumed in appellant's argument that the directors could make such a bargain and validly issue such shares. It seems to me that is a fundamental error. And as the duty of appellant, and his correlative right to set up an estoppel on the facts, about to be adverted to, must to a certain extent depend upon, or be influenced by, a correct view of the legal position in this regard, of the powers of the company or its board, let us here consider that.

To appreciate the appellant's position and contentions, and especially that dependent upon his claim of estoppel, we must bear in mind that this is not a trading company, but an insurance company, incorporated by an Act of Parliament which embraces in the Act the provisions of the "Companies' Act" so far as not excepted in the incorporating Act, but only so far as not inconsistent with the incorporating Act or the "Insurance Act."

I think we must also bear in mind the nature of the business to be embarked in, and the policy of the then existent legislation relative to such insurance companies.

Let us turn to the provisions of the incorporating statute and its auxiliary, the "Companies' Act," and see if there is any warrant for assuming that anything but money can be received for payment of shares in such company.

The capital stock was fixed at two million dollars and by section 4, it was enacted "so soon as two hundred and

fifty thousand dollars of the capital stock of the company have been subscribed and ten per cent." paid, etc., a meeting of those "who have paid not less than ten per cent. on the account of shares subscribed for by them" shall elect a board, etc.; and by section 6, "the shares of the capital stock subscribed for shall be paid by instalments," etc., and "the company shall not commence the business of insurance until sixty-two thousand five hundred dollars of the capital stock shall have been paid in cash into the funds of the company," and "the amount so paid by any shareholder shall not be less than ten per cent. of the amount subscribed by such shareholder"; and by section 7, the increase of capital is made dependent on the vote of "at least two-thirds in value of the subscribed stock of the company," etc.

No one but those having subscribed, or those claiming under them, or the profit participating policy-holders, seem contemplated by the Act as having any right to do with its affairs.

Let us turn to the "Companies' Clauses Act" and see if this enlarges that view.

The "Interpretation Act" defines the shareholder to mean "every subscriber to or holder of stock in the company," which does not help us much, for obviously a transferee of stocks might not be "a subscriber," yet "a holder of stock" and the latter might be such without either being subscriber or transferee if otherwise power given to create stock without a subscription and without cash payment.

When we consider each and every section of that Act I think the utmost that can be said relative to the scope thereof, is that there is nothing expressly giving power to create stock otherwise than by subscription and payment in cash. We must bear in mind that the purpose of the Act is to supply a standard set of clauses which will subserve any legislation relative to all the joint stock companies Parliament can create, save as to railway, banking or insurance companies.

Yet when by sec. 17 of the company's incorporating Act the "Clauses Act" is adopted save as to specific sections, it guards that adoption by adding thereto the words, "in so far as the said Act is not inconsistent with any provisions of this Act or of the Insurance Act."

We are thus thrown back upon the sections I have quoted from the incorporating Act, the general purview thereof and

of the "Insurance Act" and the clear principle which though daily repeated is sometimes lost sight of, that corporate bodies are only endowed with such powers as the creating Legislature has given them. There may, however, be implications in the creations to give them activity.

Nor should we overlook the fact that having regard to such implied purpose there are numerous cases which at an early stage of the operation of the English Act of 1862, the Courts held the power existed of accepting payment of moneys worth, instead of cash.

That Act was general and intended to be most comprehensive in its terms and operations, and unless such elasticity was given it would have largely failed of its purpose. At the outset the most useful thing it could be put to was to create corporate bodies to take charge of existent properties used for business or connected therewith or the goodwill thereof.

The situation which thus arose was of an entirely different character from that existent at and surrounding the creation of this company. The purpose to be executed was entirely different. And there the result was soon specifically guarded against in the Act of 1867.

On the whole I conclude that the Act of incorporation here in question, does not contemplate the issue of stock for anything but money, and at all events is not a thing that can be done by the directors exercising only the usual powers of management assigned them.

Whether possible to be directed upon due consideration by the shareholders or not, it is not necessary for me to determine beyond this, that I do not think such a case was presented to them as to entitle them to delegate both the right to act for them in the making of such a contract and the determination of all the details of such a bargain as the manager, Ostrom, induced a meeting in April to do, and the reference did not include any issue of such stock to appellant.

If no power exists, of course, there is an end of this case.

But there is another aspect of the matter, and that is that the question of the power of the company to make a bargain at all, and of the board in that respect, and of the grave doubt that must exist to put it no higher, are all matters lying open for the appellant to have considered and are not mere matters of the internal regulation of the company's mode of transacting business, and thus hidden from any one

having dealings with the company. This appellant was not, therefore, in this case of necessity restricted to the measurement of the authority of this company's officers by what it was clearly apparent the company had held them out to the world as having power to do in the way of binding the company. He had the statutes for his guide and a warning in the pleadings.

I am also strongly impressed in this particular case with the facts that the appellant's whole claim rested upon his dealings with the manager, Ostrom, personally, and that in such a case it was his bounden duty to have ascertained, not only that Ostrom had discharged his full duty by making to his employers the complete disclosure that for him in his situation, dealing for and with them, was necessary to found any contract between him and them, and had given due consideration for that he must have professed to have acquired from them the right to transmit to appellant. Nothing can be clearer than that Ostrom neglected his duty in these regards, acted without any, or even the shadow of any, authority, and that upon the most casual sort of investigation, such as I have indicated was required of this appellant, he never could have been deceived or in any way misled.

Nor was this the less incumbent upon him because he saw the signature of one purporting to act as vice-president attached to this certificate he rests upon.

I cannot understand how any one dealing with such an issue as was presented for trial could assume without more information that the company had changed its front and policy so suddenly as to have matured any scheme that would have justified in law the issue of such stock as this certificate professes to evidence. And that he was alive to this is pretty evident from his counsel's letter three weeks after the alleged settlement, appearing in Mr. Kerr's letter of the 6th of March, 1906.

It is as follows:—

March 31st, 1906.

A. W. Holmsted, Esq.,
Barrister, etc.,
Toronto.

Mackenzie v. Monarch Life.

Dear Sir.—There does not seem to be any prospects of the Monarch Life issuing shares in this matter, and I understand that the shareholders have refused to agree to the proposition which Mr. J. K. Kerr assured me would be sat-

isfactory. Had we better not see about getting the case again placed on the list for trial?

Yours truly,

(Sgd.) Jas. Bicknell.

But more than that the appellant must have known from the very nature of things he was doing and being a party to, that neither he nor any one else had given the company anything, and that they could not be compensated for such a transaction by a release to Ostrom such as appears unsigned, but dated May 4th, 1906, and seems the true consideration as proposed for the issue of such stock.

Having regard to all these things and everything implied therein, we are tempted to ask, what could the payment to Ostrom of the sum of \$50,000 for such an illusory thing as the alleged copyrights be, but a plan for exploiting a company that seemed to have had for two years a desperate struggle to come up to the standard needed to get organized, and to justify the issue of a license to entitle it to enter on its proper business.

Such being the general features of the material circumstances presented to appellant's mind up to said date, let us see if we can, accurately, just what did happen out of which there could spring an estoppel of such grave import as we are presented with here.

The case was again entered on the trial list. Matters so far as we can see, unless some illegal resolutions, stood as they had done quite unchanged from the view presented to Mr. Bicknell's mind, on the 31st of March, 1906.

Then in some way, but how brought about is unexplained, Mr. Kerr sends the following telegram from Ottawa:—

May 2nd, 1906.

From Hull, Ottawa, Ont.,

To James Bicknell, K.C.,

Bicknell & Bain, Barristers, Toronto.

Tried to see you when in Toronto; have arranged with Ostrom for transfer of shares as per agreement signed by me and will be approved of by directors at first meeting to be called for that purpose, as soon as possible. Kindly let case stand over, and oblige.

J. K. Kerr.

This may have been relied upon by appellant, but if so by its very terms he has to get the adoption of the board as basis for the issue of stock. Any undertaking to do so, even

if broken, does not furnish ground of estoppel, but action for breach of the contract expressly made. We have, however, no evidence of any right in Mr. Kerr to act for respondent. And the minute book put in evidence and freely referred to by counsel on the argument, discloses no meeting from the 15th of April to the 19th of May, of either shareholders, directors or executive committee. In presence of such a record in evidence referred to by all parties, I fail to see how it can now be questioned as inadmissible.

Nor can I understand when such record shews no meetings were had, how, as is argued, the respondent was driven to call any or perhaps the whole of the twenty-five former directors of previous three years to attend, scattered as the record shews they were, from Montreal to Winnipeg.

Moreover, the record shews the company had resolved to move its headquarters to Winnipeg, before this telegram from Mr. Kerr. The telegram from Mr. Kerr so far from misleading, put appellant on his guard and imposed the duty on him of seeing before venturing to act on the alleged stock certificate that the directors had met and sanctioned it.

On the 14th of May the parties signed the following consent of dismissal of the action:—

Ewan Mackenzie,

Plaintiff;

and

The Monarch Life Assurance Company and T. Marshall Ostrom.

Defendants.

We hereby consent that this action be dismissed without costs.

Dated at Toronto, this 4th day of May, A.D. 1906.

James Bicknell,

For plaintiff.

D. C. Ross,

For defendant Ostrom.

Matthew Wilson,

For defendant company.

This had to be substituted for another of a very different import, because the company's counsel very positively refused to sign the other or take part in such proposals of settlement as it indicated might be on foot. Such rejection must be held to have been known to the appellant. That rejected form of settlement, and its rejection being so known he cannot pretend fairly he was ignorant of the cause thereof, reads as follows:—

This action is settled as follows:—

1. The defendant, T. Marshall Ostrom, delivers to the plaintiff twenty-five fully paid-up shares of stock in the defendant company.

2. The defendant, T. Marshall Ostrom, in addition to the amount already paid, will pay \$50 in full of any remaining costs of the plaintiff.

3. Except as above there shall be no costs to either party.

4. The plaintiff will release to the defendant Ostrom or to the company as his nominee any interest which he has under the assignment in question herein from one George Stevenson in the interim copyrights in question herein.

Dated this 4th day of May, 1906.

James Bicknell, counsel for plaintiff.

Matthew Wilson, counsel for Monarch Life.

D. C. Ross, counsel for T. Marshall Ostrom.

Now we have presented for redemption or adoption three years later, this certificate bearing date, let it be well noted, the 3rd of May, 1906, undoubtedly in existence, and I think, handed over to appellant's solicitor before the final consent to the dismissal was signed.

Mr. Kerr's telegram of the 2nd of May, could hardly have been supposed to have been implemented by the directors' meeting and with marvellous despatch producing this thing on the 3rd of May. The most casual inquiry would have disclosed the twenty-five directors were so widely scattered that such a thing was impossible. And careful inquiry would have disclosed the facts that the seat of business for such meetings had to be Winnipeg.

Now can it be said this evidence proves what constitutes an estoppel in conformity with any legal definition thereof?

How can it be said the company did anything that misled appellant?

How can he plead reliance on its acts or alleged acts as consistent with this certificate, in fact of the positive refusal to sanction such a settlement as might have implied the countenancing of the issue of said stock?

How can he, who is told the stock will be transferred with the approval of the board of directors in the future, pretend he acted upon the facts of its issue having been already made as if approved?

How can he pretend to ignorance of the prerequisite of approval of shareholders or board placed before him in such divers ways?

How can he claim these officers had ever been held out as possessing the right to so issue certificates of this kind, which on their face presuppose the cash had been paid?

I think this appeal should be dismissed with costs.

HON. MR. JUSTICE DUFF:—The questions arising on this appeal, if not strictly questions of law, depend it seems to me, upon considerations of very wide application; the weight to be attached to these considerations in the Courts of law being, I should think, a matter of no little importance to the very large number of people who invest their money in the purchase of shares in joint stock companies.

The facts are hardly in dispute. The appellant received through his solicitor a share certificate in the ordinary form stating that he was the owner of 25 shares of fully paid-up stock in the defendant company. This certificate had been received by his solicitor from the solicitor of one Ostrom, the managing director of the company, in settlement of an action then pending between the appellant as plaintiff and Ostrom and the company as defendants. The action had been brought to establish that the appellant was entitled to an interest in certain copyrights of insurance plans which Ostrom had professed to assign to the company. The plaintiff alleged that the company was advertising and otherwise making use of these plans in violation of his rights as part owner of the copyrights and he claimed an injunction accordingly. The action having come on for trial was adjourned (according to the note of the presiding Judge), to enable a settlement to be carried out. There was some delay, but eventually it was arranged that Ostrom was to transfer 25 fully paid-up shares to the appellant in satisfaction of his claim, and the certificate in question having been delivered by Ostrom's solicitor the action was by consent dismissed. In point of fact the appellant was not registered as the holder of any shares. Ostrom had transferred none to him, and had no fully paid-up shares to transfer; the issue of the certificate, moreover, had not in fact been authorized by the directors. The appellant contends that he, having acted upon the certificate by consenting to the dismissal of his action (thereby altering his position) the company is estopped from disputing the truth of the statement contained in it, viz., that he was at its date the registered holder of the shares mentioned.

It was not disputed on the argument, or at all events, but faintly disputed, that this consequence follows if the statement in the certificate must in law be taken to be the statement of the company. The good faith of Mr. Bicknell, the plaintiff's solicitor, in accepting and acting on the certificate, is expressly found by the learned trial Judge. "There is no charge of bad faith against any person except Ostrom," he says. The learned Judge, as appears from his manner of dealing with the question raised, indubitably meant to relieve Mr. Bicknell from any suggestion that he had any suspicion touching the propriety of Ostrom's conduct in delivering the certificate. Upon the same hypothesis, the case was considered in the Court of Appeal, and I cannot find that any imputation against the good faith of the appellant has been made by counsel for the respondent throughout the case. It seems clear, therefore, that it is on that basis that the appeal must be determined; but as some point is now made against the plaintiff in this connection, there is one observation which I think ought not to be omitted. It was Mr. Bicknell, who on behalf of the appellant carried on the negotiations with Senator Kerr—whom he believed, as the learned Judge has found, to be acting for the company. Senator Kerr foresaw no difficulty in carrying into completion the arrangement that Ostrom was to transfer 25 shares (fully-paid) to the appellant Ostrom's solicitor, Mr. Ross, a reputable member of the profession, saw no difficulty. Mr. Wilson, the counsel for the company in the action (who, as the books in evidence shew, had been acting as the company's general solicitor) was made fully acquainted with the terms of the settlement, and (in view of his attitude I am bound to assume), had no suspicion that Ostrom in proposing to transfer fully paid-up shares to the appellant was contemplating any juggling with the company's books, or any improper use of the company's name or seal. In the minds of these three gentlemen, presumably much more fully acquainted with Ostrom's relations with the company than Mr. Bicknell, an outsider, could be, the settlement excited no suspicion or apprehension of impropriety. In these circumstances, if any point was to be made against the plaintiff's good faith, it ought to have been made, and distinctly made, at an earlier stage in the litigation. The question is then: Is the company bound by this statement as its own statement? I think it is bound by it.

The powers of the directors in respect of such certificates appear in sec. 13 (a) of ch. 118, R. S. C. (1886):—

13. The directors of the company may, in all things, administer the affairs of the company, and may make or cause to be made for the company, any description of contract which the company may, by law, enter into; and may from time to time, make by-laws not contrary to law or to the special Act or to this Act, for the following purposes:—

(a) The regulating of the allotment of stock, the making of calls thereon, the payment thereof, the issue and registration of certificates of stock, the forfeiture of stock for non-payment, the disposal of forfeited stock and of the proceeds thereof, and the transfer of stock.

In the execution of these powers the directors passed by-law X. (d) in the following words:—

(d) Certificates shall be issued for stock after payment of at least ten per centum of the par value, and each certificate shall shew upon its face the number of shares and the amount paid upon the stock represented by such certificate at the date of such certificate, and all such certificates shall be signed by the president or vice-president and the manager and be sealed with the seal of the company; but, unless by special resolution of the directors, no shareholder shall be entitled to receive a second or subsequent certificate until he shall have delivered up to the company all prior certificates received by him from the company for the same stock.

The persons thus appointed to sign and attest the attaching of the corporate seal to stock certificates are the persons who by another article of the by-laws are charged with the general duty of executing documents on behalf of the company. The certificate in question here was signed by one of the vice-presidents—Dr. Graham—and by the managing director. It was stated in argument and not denied that the book of stock certificates which by leave of the Court was returned to the respondent company after the trial, shews the vice-president in question and the managing director to have been the officers who down to the time of the transaction in question usually performed the duty of issuing such certificates. The minute book in evidence, moreover, shews that Dr. Graham usually presided at the meetings of the directors and of a committee called the executive committee to which the directors had professed to delegate their powers of management.

There can be no doubt that under the by-law set out above the vice-president and the managing director would be acting within their powers in issuing certificates to persons holding shares upon which the minimum amounts had been paid. There can equally be no doubt that they would be acting beyond their powers in issuing such a certificate in the name of a person not a stockholder. But if in such circumstances, they issue a certificate, I do not think it is necessarily a nullity. Share certificates, as everybody knows, are acted upon as documents of title. Speaking broadly, they do not in themselves confer ownership—they are only evidence of ownership and perhaps apart from statutory enactment evidence only against the company itself; but in practice they are treated as documents of title and the Courts have so far recognised their character as such as to hold that the deposit of a certificate may create an equitable mortgage of the shares to which they relate. As representing those shares they constitute a most important part of the movable commercial securities of the country.

Nor for such purposes a certificate (I am assuming it to be genuine in the sense that it is executed by the proper persons, the persons who, if the statements contained in it were true, would be the persons to execute it and give it forth to the world), would be perfectly valueless unless the statements certified to are to be taken to be the statements of the company itself. In commercial usage that is what a share certificate means—a statement not by an officer of the corporation, who may or may not be mistaken, but a statement by the corporation itself upon the faith of which the public are entitled to act. It before acting upon the statements you must first at your peril investigate them what purpose does the certificate serve? Such a view of the effect of share certificates would, I think, it is no exaggeration to say, quoting the language of Lord Cairns in *Burkinshaw v. Nicholls*, 3 App. Cas. 1004, at p. 1007, paralyze the whole of the dealings with shares in public companies. The representations then, contained in such documents as to the title to the shares and the amount paid upon them are representations which it is expected will be acted upon, and the object of the by-law authorizing certain named officers to execute such certificates is to place in the hands of shareholders documents upon the faith of

which the public may act without further inquiry than to ascertain that they have been executed by those officers.

The statute left it optional with the directors whether they should or should not make provision for such certificates. But in making such provision, and providing that every shareholder on whose shares 10 per cent. had been paid should be entitled to such a document, they must be taken to have intended to arm the shareholder with a document which when executed by the proper officials should carry with it all the authority of a certificate given by the company.

It may be noted that the persons appointed for the purpose mentioned were not merely servants. The signatures of the managing director and the president or one of the vice-presidents, or two directors were required. It is not easy to see how a stranger to the company could expect to verify a statement as to the contents of the company's books by obtaining any assurance which would be more conclusive than a statement so authenticated. In point of fact (whatever may be said about a document executed by officers whose duties are well-known to be ministerial only) no ordinary business man should think in ordinary affairs of business of refusing to accept and act upon a share certificate under the company's seal and signed as this was by such officers as a vice-president and a managing director when by the by-laws of the company these officers had been appointed to exercise, and regularly did exercise, the function of authenticating the execution of such instruments on behalf of the company.

The respondent's position rests upon two cases, *Ruben v. Great Fingall Consolidated Co.*, [1906] A. C. 439; and *Whitechurch v. Cavanagh*, [1902] A. C. 117. The distinction between this case and both these cases lies on the surface. In the first the certificate was not signed by the persons appointed to sign such documents. Their signatures were forged. The House of Lords held that the secretary who had countersigned it was not authorised to warrant the validity of the certificate. It does not appear to have been doubted that if the signatures had been genuine the company would have been bound. At page 447, Lord James of Hereford expressly says that in such a case the certificate would be binding. It is surely one thing to say that the persons authorised to execute such a document are thereby authorised to warrant in the name of the company

the truth of the statements contained in it, or in other words that the public is invited to act upon a document executed by them, and a very different thing to say that the public is invited to act upon the signature of one of them only. That is the difference between the appellant's contention here and the unsuccessful contention in the *Ruben Case*, [1906] A. C. 439. In the *Whitechurch Case*, [1902] A. C. 117, it was held that the secretary had no authority to guarantee the truth of the representation contained in his certification. The distinction is pointed out in all the judgments between a certification such as was there in question, and a certificate under the seal of the company, pages 126, 134. That persons empowered to execute documents of the latter character have (as necessarily implied in the power to execute such documents) the authority to warrant on behalf of the company the truth of the statements made in them was assumed throughout. The authority to give a certification of transfer on the other hand, does not imply (for the reasons pointed out by Lord Macnaghten) any invitation to the public to act upon it.

If I am right in thinking that by placing in the hands of the officers in question the authority to issue such certificates and permitting them to exercise such authority, the company invited the public to act upon the faith of certificates authenticated by them, then I think no difficulty arises from the fact that Ostrom was acting fraudulently for his own purposes. In the *Mahony Case*, L. R. 7 H. L., the directors were acting fraudulently for their own purposes and so were the agents whose acts were in question in *Bryant v. La Banque du Peuple*, [1893] A. C. 170, and in *Hambro v. Burnand*, [1904] 2 K. B. 10.

I should perhaps add this. It was not argued that the vice-president and managing director were not the proper persons to issue certificates, on the application of the holder of shares in proper cases, or that they had not full authority to execute them in such cases. Indeed, the authority is admitted in the respondent's factum. If it should be suggested that they could attach the corporate seal only under the authority of the directors the answer is: assuming that to be so—I think that is clearly not the true construction of the by-laws—it is plain that these are the persons who are to authenticate the affixing of the seal. The by-laws quoted make that plain, and having that authentication a stranger is entitled to act upon it: *Montreal*

Light, Heat & Power Co. v. Robert, [1906] A. C. 196, at pp. 202 and 203.

It is proper also to mention the suggestion that certificates of shares in this company differ from certificates of shares affected by the "Companies Act, 1862," inasmuch as there is no enactment (corresponding to the provision in that Act) making the certificates of the respondent company prima facie evidence of title. That I think is not material. If the statement in the certificate in question is to be treated as the statement of the company, then the doctrine of estoppel comes into play. That the English decisions upon the subject do not depend on this provision of the company Acts is clear from this. In many of the cases it is not the title to the shares, but the liability to pay calls upon them or the right to hold them without paying such calls, that is in question. On this point there is no statutory provision; but the estoppel operates notwithstanding its absence.

N.B.:—*Charnwood Case*, 18 Q. B. D. 714, secretary had no authority to warrant correctness of a statement on behalf of master.

HON. MR. JUSTICE ANGLIN:—I agree with Meredith, J.A., that, upon the evidence in the record, and especially in the absence of proof of the authority of Mr. J. K. Kerr to represent the Monarch Life Assurance Company, it must be held that so far as the defendants are concerned the only settlement made, of the former action, was that it should be dismissed, as it afterwards was, as against them without costs; that they were in no way parties to the settlement made between the plaintiff and their co-defendant Ostrom, in that action.

I find myself, however, unable to concur in the view which prevailed in the Ontario Court of Appeal as to the value of the certificate produced by the plaintiff as evidence that he is a shareholder in the defendant company, or as to the proper conclusion upon this question from the evidence adduced at the trial.

I express no opinion upon the issue of estoppel, which was much discussed at bar. When and how far such a document as the certificate held by the plaintiff, regular in form, creates an estoppel against the company whose officers have signed it and whose seal it bears is, upon the authorities, a question of some difficulty, which, in the view

I take of the present case, it is not necessary to determine. That this case does not fall within the line of decisions of which *County of Gloucester Bank v. Ruddy & Co.*, [1895] 1 Ch. 629, is an example, but should be held to be governed by the principles on which the judgment in *Ruben v. Great Fingall Consolidated Co.*, [1906] A. C. 439, proceeds, I am not wholly satisfied. There is at least one marked distinction between the facts in the *Great Fingall Case*, and those now before us.

It is quite true, as stated by the learned Chief Justice of Ontario, that there is nothing in the special Act incorporating the defendants, 4 Edw. VII. ch. 96, or in sections of the "Companies Clauses Act" (Dom.) R. S. C. (1886), ch. 118, which are declared applicable to the defendant company, similar to the provisions contained in the "Imperial Act," 8 and 9 Vict. ch. 6, amended by various other acts, requiring the defendants to deliver to a shareholder a certificate of proprietorship which is to be admitted in all Courts as *prima facie* evidence of the title of the person named in it.

We have no provision corresponding with section 23 of the "Imperial Companies Act of 1908," which declares that "a certificate under the common seal of the company specifying any shares or stock held by any member shall be *prima facie* evidence of the title of the member to the shares or stock." But these statutory provisions would appear to be merely declaratory of what would without them be held to be the law. For, as pointed out by Magee, J.A., such a document as the certificate produced by the plaintiff is, apart from any statutory enactment, "*prima facie* evidence of its truth."

In *Hill v. Manchester Water Works*, 5 B. & Ad. 866, Denman, C.J., says, at p. 874:—

"The plaintiff proved that the common seal of the company was affixed to the bond by the officer who had legal custody of it, and so threw upon the defendants the burden of proving clearly that it was not set by their authority."

In *D'Arcy v. Tamar*, L. R. 2 Ex. 158, Bramwell B., at p. 162, says:—

"It is not to be presumed that what has been done is *ultra vires* and therefore when the bond is produced under the seal of the company it is *prima facie* to be taken that the seal was properly affixed."

And Channel, B., adds:—

"On production of the bond under the corporate seal it is prima facie to be assumed that it is valid."

In *North West Electric Co. v. Walsh*, 29 Can. S. C. R. 33. Sedgewick, J., delivering the judgment of the Court, says at p. 50: "The fact that the respondent held a paper which upon its face stated that she held so much stock paid in full, while evidence of the statement, was not conclusive evidence of it."

See, too, *Montreal v. St. Lawrence L. & P. Co.*, [1906] A. C. 196, at pages 202-3.

By the production of his stock certificate, therefore, the plaintiff established a prima facie case entitling him to relief. How is that case met by the defendant, upon whom the burden was thus cast of proving that the plaintiff is not the holder of the shares mentioned in his certificate? Its plea is that:—

1. If the plaintiff holds a stock certificate as alleged, the same was not issued by the defendant and the amount thereof was not paid up to the defendant, and the defendant did not consent thereto.

The substance of this plea is that the issue of the stock which the plaintiff claims to own was not sanctioned by the board of directors of the defendant company, who alone had power to authorize it. In support of this allegation counsel for the defendant cross-examined Dr. Graham, the vice-president of the company, who was one of the signatories to the certificate. His evidence on this point is summed up in the following question and answer:—

Q. Then there has never been any authority from the board of directors at all for you to sign this certificate? A. I do not know about that.

He was not asked if he had attended all the directors' meetings; nor was he asked whether the minutes produced by another officer of the company were a true record of all that had transpired at the directors' meetings. He had no recollection of how he came to sign the certificate.

Do you remember anything about it? A. No.

His Lordship: You are not in the habit of signing things just because they are put in front of you? A. When they are filled up and signed by the managing director, I would take it for granted they are right.

Q. You have no recollection? A. No, sir.

No other director of the company gave evidence. The defendant called the present general-manager of the com-

pany, Mr. Stewart, who took office in November, 1906. The transactions leading up to the plaintiff obtaining his stock certificate occurred in March and May, 1906, and the certificate bears date the 3rd May, 1906. Mr. Stewart was made to give any evidence as to what had transpired before he became manager. He produced certain books of the company. Mr. Vansickle, a bookkeeper with the defendant, was also called. He had no part in the management and gave no evidence of any value. The defendant did not call any other witness.

Mr. Stewart produced the stock ledger, the stock certificate book, the stock application book, and the minute book of the company. These books contained no record of anything which would indicate that the plaintiff had become a shareholder in the company.

Such of these books as the company is required, by R. S. C. ch. 79, sec. 144, to keep are, by sec. 175 of that Act (one of the companies clauses provisions made applicable to the defendant company by 4 Edw. VII. ch. 96, sec. 17), declared to be prima facie evidence of all facts purporting to be therein stated. They are not, however, made negative evidence of the non-existence of the facts not therein stated. Moreover, books which the statute does not require the company to keep, e.g., the minute book of directors' meetings, are not given any evidentiary value greater than they possess at common law. At common law such books are not admissible for the corporation as against a stranger. Neither, in my opinion, can the corporation without statutory authority put them in evidence when the question at issue is whether the opposing party is a member of it or a stranger to it; *Marriage v. Lawrence*, 3 B. & Ald. 142; Taylor on Evidence (10 ed.), sec. 1781—whatever might be the case were he by common consent a member.

The company might have called some of its directors of 1906 as witnesses and by them established, if such were the fact, that at no directors' meeting was there an allotment of the shares claimed by the plaintiff. It has not seen fit to do so. It is consistent with the evidence in the record that the board of directors may have sanctioned the issue of the shares in question and that, by accident or design, a record of their action may not have been made. Counsel for the defendant contented themselves with cross-examining one director, called by the plaintiff, who was unable to negative the existence of the requisite authority for the issue of the

shares claimed by the plaintiff and with tendering in evidence its own books—some of them probably inadmissible—none of them affording the evidence which it was bound to supply.

The prima facie case made by the plaintiff, therefore, remains unanswered. The evidence of Dr. Graham sufficiently establishes that other certificates for shares were signed by him after that given to the plaintiff. It is thus made reasonably clear that when the plaintiff received his certificate the defendant held unissued shares to meet it; indeed, the defence of an over issue has not been suggested.

I am, with great respect, of the opinion that the plaintiff is entitled to the declaratory judgment for which he asks, and that his appeal should be allowed with costs throughout.

Appeal allowed with costs.

Bicknell, Bain, Strathy & Mackelcan, for the appellant.

Wilson, Pike & Co., for the respondents.

SUPREME COURT OF CANADA.

DECEMBER, 1911.

RAY AND JARVIS v. WILSON.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Promissory Note—Signature to Blank Note—Authority to Use — Condition—Bonâ Fide Holder—Bills of Exchange Act, secs. 31 and 32.

W., residing near Toronto, owned property in Port Arthur and signed some promissory note forms which he sent to an agent at the latter place to be used under certain circumstances for making repairs to such property. The agent filled in one of the blank notes and used it for his own purposes. In an action by the holder W. swore, and the trial Judge found as a fact, that the notes were not to be used until he had been notified and authorised its use. He also found that the circumstances attending the discount of the note by the agent were such as to put the holder on inquiry as to the latter's authority. The first finding was affirmed by the Court of Appeal.

SUPREME COURT OF CANADA, *held*, affirming the judgment of the Court of Appeal, 19 O. W. R. 470; 24 O. L. R. 122, FITZPATRICK, C.J., *dubitante*, that secs. 32 and 33 of the Bills of Exchange Act did not apply and the holder could not recover.

Held, per DAVIES, DUFF and ANGLIN, JJ.—The finding of the trial Judge that the circumstances never arose upon which the agent had authority to use the note was not so clearly wrong as to justify a second appellate Court in setting it aside.

Held, per IDINGTON, J.—The finding of the trial Judge that the holder was put on inquiry as to the agent's authority was justified by the evidence and bars the right to recover.

An appeal by the plaintiff from a decision of the Court of Appeal for Ontario, 19 O. W. R. 470; 24 O. L. R. 122, affirming a judgment of HON. MR. JUSTICE CLUTE, 16 O. W. R. 578, in favour of the defendants.

The facts of the case are stated in the reports of this case in the Courts below and in the above headnote.

The appeal to the Supreme Court of Canada was heard by HON. SIR CHARLES FITZPATRICK, C.J.C., HON. MR. JUSTICE SIR LOUIS DAVIES, HON. MR. JUSTICE IDINGTON, HON. MR. JUSTICE DUFF, HON. MR. JUSTICE ANGLIN, and HON. MR. JUSTICE BRODEUR.

Bicknell, K.C., for the appellants. *In Smith v. Prosser*, [1907] 2 K. B. 735, the note was negotiated before completion. That case, therefore, does not apply here.

The defendant is estopped from denying his agent's authority. See *Ewing v. Dominion Bank*, 35 Can. S. C. R. 133; *Lloyd's Bank v. Cooke*, [1907] 1 K. B. 794.

Choppin, for the respondent.

HON. SIR CHARLES FITZPATRICK, C.J.C.:—I grant that a man in his dealings with those in whose honesty he has reason to repose confidence is not expected to take such precautions as make the commission of a crime, which he has no reason to anticipate, impossible; but, on the other hand, all men are under the obligation to exercise, in their relations with their fellowmen, the care and caution of "an average prudent and intelligent man," which is equivalent to saying that we are all subject to "a duty to take care." In the special circumstances of this case, the nature and extent of that duty "to take care," must be considered with reference to the provisions of the Bills of Exchange Act, to which I refer later, passed to protect the commercial public against the reckless carelessness of men in the management of their affairs and to facilitate business intercourse. The question to be decided here is whether, in view of that Act, the respondent should escape liability as the signer of the note which is the basis of this action on this, among other grounds, that, though his carelessness may have caused the appellants' harm, he was guilty of no breach of duty towards them.

The respondent, a man of some education and means and, if we may judge by his answers to the questions put on his examination as a witness, with considerable knowledge of the

"Bills of Exchange Act," living at Newmarket, near Toronto, purchased some built on property at Port Arthur, through one Thompson, who, after the purchase, continued to manage it or him. Anticipating the probability that some repairs would be necessary to his houses, the respondent signed several ordinary lithographed bill forms with blank spaces for names, amounts, etc., and delivered them to Thompson with instructions to fill up the blanks and issue them as completed notes if and when it became necessary to procure money to pay for the anticipated repairs. After some time, Thompson filled up one of the blank forms for the sum of \$1,000, making of it a note payable on demand, and, in breach of his duty to the respondent, issued it in its completed form; the appellants are now holders in due course of that note. I believe the majority of the Court are agreed that there is no evidence to support the finding of the trial Judge, that the appellants did suspect, or had any reason to suspect, fraud. The sections of the Act upon which the appellant relied at the argument are secs. 31 and 32:—

31. Where a simple signature on a blank paper is delivered by the signer in order that it may be converted into a bill, it operates as a prima facie authority to fill it up as a complete bill for any amount, using the signature for that of the drawer or acceptor, or an indorser; and, in like manner, when a bill is wanting in any material particular, the person in possession of it has a prima facie authority to fill up the omission in any way he thinks fit.

32. In order that any such instrument when completed may be enforceable against any person who became a party thereto prior to its completion, it must be filled up within a reasonable time, and strictly in accordance with the authority given: Provided that if any such instrument, after completion, is negotiated to a holder in due course, it shall be valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up within a reasonable time and strictly in accordance with the authority given.

On the whole evidence it is apparent that the authority to fill up and issue was given contemporaneously with the delivery of the signatures on the blank forms and there is no clear finding to the contrary. To bring this case within the decision in *Smith v. Prosser*, [1907] 2 K. B. 735, an evident attempt was made throughout the examination of the respondent to shew that the express authority to fill up and issue the bills was not to be exercised by Thompson until

the respondent was communicated with for further instructions; but that the latter tacitly acquiesced in the fraud practised by his agent on the appellant, with full knowledge of all the facts, cannot be doubted. The respondent was also guilty of gross negligence when he placed Thompson in possession of the blank bills with the knowledge which he must be presumed to have had that possession carried with it *prima facie* authority to fill up the blanks for any amount. In so doing the respondent was guilty of a clear breach of duty towards any one who might subsequently become a holder in due course, if the proviso to sec. 32 does not cover the case. The only material finding of fact is that the condition subject to which the express authority to issue was given never arose.

Does the fact that the express authority to fill up and issue, given contemporaneously with the delivery of the instrument, was conditional destroy the *prima facie* authority vested by the statute in the person to whom it was delivered to convert it into a bill enforceable in the hands of a holder in due course against the maker? I am strongly inclined to doubt that it does on the facts of this case. By the evidence of the respondent seeking to escape liability, in the absence of Thompson to whom the notes had been delivered, the presumption is rebutted to this extent only. The authority to fill up and issue is admitted to have been given contemporaneously with the delivery of the instrument; but the respondent says the note was not to be used until the necessity arose to make provision for the payment of such sums as might be required to make repairs to the houses in Port Arthur, which were in the discretion of the agent Thompson. I would have been disposed to hold that in issuing the note the agent did not act in accordance with the authority given to him, but that the instrument was originally delivered that it might in his hands form the basis of a negotiable instrument; that the statute gave him *prima facie* authority to fill it up as a complete bill and, as a consequence, the proviso to sec. 32 would operate to protect the appellant. Otherwise what is the effect of that proviso? In every case hereafter the banker, instead of being able to rely upon the *prima facie* presumption resulting from possession, will be put upon inquiry and, if it appears that the note offered for discount was signed or indorsed in blank, it will be his duty to ascertain whether in fact the maker or indorser authorized the filling in or the issuing of the note

absolutely and without any secret restrictions at the time it was delivered to the person in possession. The prima facie presumption created by the statute will be no longer of much, if of any value; because it may be destroyed by the evidence of the maker or indorser seeking to escape liability in the absence or death of the party to whom the instrument was originally delivered, on the ground that the authority to issue was conditional upon an event which never happened. The proviso will cease to be of any practical use because the note is not valid and effectual and cannot be enforced by the holder in due course, notwithstanding the statutory presumption, if the authority to issue was given subject to an unfulfilled secret condition. It may embarrass the ordinary commercial man to distinguish between limited authority, which would be covered by the proviso, and authority which is conditional upon the happening of a future event. I presume that the theory is that, failing the event, authority never existed. I would have adopted the judgment of Mr. Justice Meredith; but out of deference to the opinion of the majority of my colleagues who hold that this case is governed by the judgment in *Smith v. Prosser*, [1907] 2 K. B. 735, I do not enter a formal dissent.

HON. SIR LOUIS DAVIES, J.:—If the findings of fact of the learned trial Judge confirmed as they are by the Court of Appeal for Ontario, are not disturbed by this Court, it is difficult to see how in the face of the judgment of the Court of Appeal in the recent case of *Smith v. Prosser*, [1907] 2 K. B. 735, this appeal could be allowed.

The trial Judge found as a fact “that the defendant never intended or authorized the paper sued on to be filled up as a promissory note; that the circumstances never arose upon which only the agent Thompson was authorized to fill the same up, and that what was done by Thompson was without authority and in fraud of the defendant, and that the paper sued on never in fact, by the defendant’s authority became a promissory note.”

These findings of fact were based upon the trial Judge’s acceptance of the evidence of the defendant. He was a very old man in feeble health and with a somewhat impaired memory and his evidence, owing to his inability to stand the fatigue of travelling to attend and give evidence at the trial had been taken by commission. While there were very many facts connected with his dealings with Thompson generally

and especially with respect to the note sued on which he had signed in blank and given to Thompson upon which his memory failed him, the old man was singularly clear and emphatic upon the crucial point that he had delivered it to Thompson to retain in his custody until he had notified the witness, respondent, the moneys were required by Thompson to pay for the repairs of some houses in Port Arthur belonging to the witness, for which Thompson was agent, in which case, if the witness had not the money to send Thompson then the latter could fill up and use the note, but not otherwise. The note was deposited with Thompson, so respondent gave evidence, for safe-keeping and was only to be filled up and used by him if and when he received information from respondent Willson that he could not provide and send the moneys required by Thompson for the repairs of the houses. The note was one of several so deposited by Willson with Thompson, but the one sued on was the only one Thompson attempted to use.

The crucial finding of the trial Judge has been confirmed by the Court of Appeal, Meredith, J., dissenting. I confess I have strong doubts whether I should have made the same finding on the somewhat unsatisfactory evidence produced. At the same time I have not such a clear conviction that it is erroneous as would justify me in reversing it. In a late case in the House of Lords of *Johnston v. O'Neil*, [1911] A. C. 552, Lord Macnaghten, at p. 578, stated the rule which governed that House with respect to two concurrent findings of fact as follows:—

“In such a case the appellant undertakes a somewhat heavy burden. It lies on him to shew that the order appealed from is clearly wrong.”

In a Scotch case, *Grey v. Turnbull*, in 1870, L. R. 2 H. L. Sc. 53, where there was an appeal from two concurrent findings of fact in a case in which the evidence was taken on commission and neither Court saw the witnesses, Lord Westbury, after referring to the practice in Courts of Equity to allow appeals on matters of fact, makes this observation: “If we open the door to an appeal of this kind, undoubtedly it will be an obligation upon the appellant to prove a case that admits of no doubt whatever.” In an English case, *Owners of the P. Caland v. Clamorgan Steamship Co.*, [1893] A. C. 207, Lord Watson expressed himself as follows:—

"In my opinion it is a salutary principle that Judges sitting in a Court of last resort ought not to disturb concurrent findings of fact by the Courts below, unless they can arrive at—I will not say a certain—because in such matters there can be no absolute certainty—but a tolerably clear conviction that these findings are erroneous, and the principle appears to me especially applicable in cases where the conclusion sought to be set aside chiefly rests upon considerations of probability."

We have adopted and followed in this Court of last resort in Canada the rule substantially as Lord Watson states it.

Accepting, therefore, the findings of fact on the question of the intention with which the blank note signed by respondent Willson was left with Thompson in the case concluded by *Smith v. Prosser* above cited. The facts with regard to the intention with which the signed blank notes were left in the hands of a third party as custodian were substantially the same in that case and this, and in each case the custodian had filled up and negotiated the blank note with a third party, who for the purposes of my argument may be held to have been a "holder in due course," without any instructions from the defendant authorizing him to do so.

Sections 31 and 32 of our "Bills of Exchange Act," R. S. C. 1906, ch. 119, are practically transcripts of the secs. 20 and 21 of the English Act. The only difference is that the latter applies to paper bearing a stamp which has been signed in blank.

The criticism of Mr. Bicknell upon the case of *Smith v. Prosser*, [1907] 2 K. B. 735. was that it was a decision upon a question of fact only and that the Court there held the provisions of the "Bills of Exchange Act" inapplicable and decided the case upon the common law doctrine of estoppel. It is true that the Court did hold the sections of the "Bills of Exchange Act" inapplicable because the note in that case was not stamped when negotiated, but they also held that the passing of that Act which codified the then existing law did not alter in any respect material to that case the law as laid down in the prior authorities.

Vaughan Williams, L.J., says, at p. 744:—

"I do not desire to rest my judgment on that ground (that is, that the holder of the note had notice that Telfer, the party who negotiated the note with him, was acting under a power of attorney, and that the plaintiff ought to have made inquiries), nor do I rest it on the ground that

there was no stamp, impression or adhesive on the note when Telfer assumed to negotiate it."

The learned Justice then goes on:—

"I propose to deal with the case in this way. Here is a document which was in an incomplete state at the moment of its negotiation. If that note, being in that condition, had been handed to Telfer (and I leave out of consideration for this purpose the fact that Telfer and Wilson were joint attorneys) for the purpose of his making use of it, and for the purpose of its being issued as a negotiable instrument, I am of opinion that *prima facie* the defendant would have been responsible to a bona fide holder for value who had purchased the note from Telfer as the plaintiff did. In my judgment it is of the very essence of the liability of a person signing a blank instrument that the instrument should have been handed to the person to whom it was in fact handed, as an agent for the purpose of being used as a negotiable instrument, and with intention that it should be issued as such."

Fletcher Moulton, L.J., after first holding that under the special circumstances of that case the action must fail, said, p. 752:—

"I am also of opinion that the same conclusion will follow if it be considered upon the broad grounds upon which Vaughan Williams, L.J., has based his judgment, in which I entirely concur. The law stands thus. If a person signs a piece of paper and gives it to an agent with the intention that it shall in his hands form the basis of a negotiable instrument, he is not permitted to plead that he limited the power of his agent in a way not obvious on the face of the instrument."

And at p. 753:—

"The essential fact which is necessary to enable the defendant to establish his case is, therefore, absent. The defendant never issued the documents with the intention that they should become negotiable instruments; and . . . In my opinion sec. 20 is based upon the doctrine of common law estoppel as it existed at the date of the Act, and, therefore, the presence of the condition as to its operation shews that the legislature realised that the intention that the document should be converted into a bill of exchange was essential in order to render the maker liable."

Buckley, L.J., bases his judgment on the same ground, namely, that "the promissory note never becomes negotiable

instruments, the reason being that the defendant never issued them nor authorised any one else to issue them as negotiable instruments."

The true construction, therefore, of secs. 31 and 32 of the "Bills of Exchange Act" so far as the protection of third parties holders in due course is concerned, limits that protection to cases where the signer intended the instrument signed by him to become a bill or note, and authorised its issue for that purpose. Where that intention is proved it matters not whether his instructions to the person he delivered it to were exceeded or not. He is liable upon it. If on the contrary that intention is disproved and it is shewn the instrument signed was not intended to be issued or became a bill or note, but was left for safe custody in some agent's hands to await further instructions as to its issue, he is not liable if the bill or note is fraudulently issued by the agent or holder without such further instructions.

Our duty is to expound the law as we find it, and doing so, I am of opinion that on the findings of fact in this case, which I am unable to conclude are clearly wrong, the appeal must fail and be dismissed with costs.

HON. MR. JUSTICE IDINGTON:—I am not entirely free from doubt regarding respondent's version of the facts which led him to entrust his signatures to Thompson.

It is difficult to understand why such an expedient should have been resorted to merely to anticipate repairs on his buildings.

My doubt, however, is not of such a nature as to entitle me to reverse the findings of fact by two Courts below. I am clear the respondent was trying to tell the truth. And though possibly in error in assigning possible repairs as the subject-matter he had in view, it is extremely improbable that he is entirely mistaken in saying Thompson had no right to use the signature for his own purposes.

Taking the view of the facts that the Courts below have done it seems impossible to hold otherwise than they have done without discarding the reasoning upon which the judgments in *Smith v. Prosser*, [1907] 2 K. B. 735, proceed.

It is to be observed, however, that the reasoning adopted was entirely unnecessary on the facts presented for the decision of that case and hence binds no one save so far as the reasoning adopted may. I do not think, however, this case requires us to adopt or discard the reasoning.

The exact shade of fraud involved in Thompson's misconduct is not to my mind so clearly and accurately determined as to apply or rather say we must apply the reasoning adopted in *Smith v. Prosser*, [1907] 2 K. B. 735.

All I am here, however, concerned with is, whether or not there is ground for finding a fraudulent use of the respondent's signature. I do so find. Whether the fraud is exactly of the kind dealt with in *Smith v. Prosser*, [1907] 2 K. B. 735, or more akin to the class of case needing the application of such reasoning as adopted in the case of *Lloyd's Bank v. Cook*, [1907] 1 K. B. 794, matters little. The appellants are on such finding of fact bound to shew that they are holders in due course, which, I think, involves both good faith and valuable consideration.

And assuming that but for want thereof they would have on any ground been able to claim to recover on the note Thompson made out of his improper use of respondent's signature, I fail to see how they can succeed here or hope to succeed here in face of the finding of the learned trial Judge.

He finds as fact that the plaintiffs "had reason to suspect and did gravely suspect the bona fides of Thompson as the holder of the note." At least two of the learned Judges in the Court of Appeal accept this finding as well founded.

Care in taking a negotiable security is surely not too much to exact from those asking and in proper cases enjoying immunity as holders thereof. And I may add that bankers ought to preserve some record of such transactions where they in the course of such business can hardly be expected to remember every detail of their every day dealings.

The onus of proving they are holders in due course and in the sense I attribute thereto rests on them taking the security.

The appellants are not able to shew satisfactorily where they got this note or what they paid for it, or what it in fact was collateral to if taken as collateral at all.

The appellants were both on the witness stand. The only one who professes to know the details of the transaction professes it was got as incidental to the needs of Thompson to pay a hundred dollars to the Union Bank, which held it as security therefor and was pressing for its payment.

The Court adjourned the case for some hours to enable him to produce his books and papers and I infer if he had chosen he could have brought the officers of that bank as well as his own books and papers to establish the facts.

When the books were produced he could not put his finger on anything to clearly corroborate his story or fix the time of fact of payment which he alleged he had made.

There is no record indeed of his having the note except an entry made two months at least after the Thompson account seems to have been closed, and that is an entry in his register of bills for collection, of this, and two notes of another party upon which he seems to have placed according to his evidence little, if any, value.

His story of how they came to be there recorded suggests rather he had found himself possessed of things he had forgotten.

He says he had continued to press Thompson for payment, but it never seems to have occurred to him to demand payment of this note (a stale security when got by him) from the maker for four months after getting it and for two months after it was placed among bills for collection. Why? What was he afraid of? It was a demand note, a class, he admits, they would not deal in usually.

He admits he knew the Union Bank might have demanded it and thus rendered it an overdue bill when he got it, yet he never inquired as to the fact.

Why did he so shut his eyes? He seeks to claim it as collateral. He tells three times over the story of how he got it.

The first time he says:—

“I told him if he would go to the Union Bank and bring the note in I would pay the Union Bank and hold it against everything he owed us.”

Not a word in this as to future advances, yet he thinks it was on the 18th of May and, after more dealings meantime the account closed the end of June.

We have no explanation beyond the ledger debiting after the 18th May of items amounting to a total of four to five hundred dollars and discounts crediting to amount of eight hundred dollars and yet a gradually rising debit balance.

What right could he have on such a statement of how he was to have held it to apply it to these dealings?

Besides, it is rather curious he does not venture there to swear Thompson agreed to what he said. It is left in a case of this kind to mere inference or surmise which might be most misleading.

On the second version of the story in reply to the learned trial Judge interrogating him as to what took place, he is still more vague and does not refer to, holding it as collateral to anything.

If this version, as it stands, is the true statement, then he had no right to hold it for anything but the advance proposed to redeem it by the Union Bank.

It is quite consistent with the idea of a mere hope that something more than expressly stipulated for might come from its collection.

On a third attempt to explain the transaction in answer to the learned trial Judge asking him to state what took place when Thompson delivered the note, he repeats the story of Thompson's having been pressed by the Union Bank and wanting money to pay it off and take the note and then adds: "I asked him if he would give it to me as collateral for all he owed me and he said yes," and proceeded to speak of a lot of things to remember, etc.

I have compared this statement with the answer given to the identical question some time before.

They do not look much alike. The learned Judge saw the witness, and was in an infinitely better position than I am to draw the proper conclusion to be drawn from variations of the story.

There was a statement also made by the witness between his first statement to his own counsel and the first statement to the learned trial Judge in which he refers to a note of another party for which Thompson was responsible and he says, speaking of what he held this note for: "There was a note of a man named Williams whom I did not consider good and I told him so, and I told him I wanted collateral for that."

This is not introduced in any of the other three statements I have referred to.

I cannot help observing that in each of these three versions which I have specially referred to, the witness uniformly states the facts relative to the Union Bank holding the note for a hundred dollars and pressing for payment, and Thompson needing funds to pay it off, in substantially the same terms, but where, speaking of the question of

holding the note for collateral purposes, the story varies most remarkably.

Again the whole business is in one place alleged to have taken place in one day. He did not know Willson. He says one place as follows:—

“Q. Did you make any inquiries as to who Willson was, when you took this note? A. Yes.

Q. Did you know beforehand who he was? A. I don't know that I did; I don't remember whether the question ever came up.

Q. So you knew of no transaction with Willson until this came up? A. That's all.”

The desperate financial condition in which Thompson was, he admits knowing all about, from Thompson's telling him in confidence.

It was hopeless to have expected anything from him and yet this stale demand note is not demanded until after Thompson had made an assignment for the benefit of his creditors to this witness, and as I infer, had left the country or at all events that part of the country.

The exact date of his leaving is not fixed, but the witness says:—

“Q. Or whether it would become due upon demand? A. When I presented it at the Bank of Montreal at Port Arthur, I protested it.

Q. How long after Thompson went away was it you deposited it at the Bank of Montreal? A. I could not say; a short time afterward.”

The estate realised about three cents on the dollar. The note was a demand note filled up by Thompson and was about a year old when appellants got it, then stamped on its face with the Union Bank, “B.C.” stamp.

I cannot held, under such circumstances as shewn throughout in the evidence I have referred to and other evidence in the case, that the learned trial Judge erred in his finding, from which I have quoted above. I, therefore, think the appeal should be dismissed with costs.

HON. MR. JUSTICE DUFF:—I think this appeal should be dismissed on the ground that the promissory note sued upon was a simple forgery and that the appellants are not within the protection of secs. 31 and 32 of the “Bills of Exchange Act.”

I agree with the trial Judge and the majority of the Court of Appeal that Thompson had possession of the paper entrusted to him by the respondent as custodian only and that he had no kind of authority to convert it into a negotiable instrument for any purpose whatever. I think secs. 31 and 32 of the "Bills of Exchange Act" have no application to such a case; that their operation is confined to those cases in which there is a limited authority to convert a signature attached to a blank paper into a negotiable instrument or to convert an incomplete instrument into a complete instrument and that authority has been exceeded or abused.

The design and effect of the sections in question are, I think (if I may say so with respect), stated with accuracy by Fletcher Moulton, L.J., in *Smith v. Prosser*, [1907] 2 K. B. 735, at pp. 753 and 754, in these words:—

"In other words, both the common law and the statute realised the possibility of two rival dangers—on the one hand, a person who did nothing more than sign a blank stamped paper might find himself in the position of being a maker of a bill or note; on the other hand, a man might issue an incomplete bill or note and place it in the hands of an agent with a limited authority to fill it up, and the agent might fill it up without due regard to the limitations of his authority and put it in circulation and thereby injure innocent persons. They, therefore, drew the line as regards protection of third parties in the following very reasonable and intelligible way: If the signer intended it to become a bill, it was for him to see that it was issued in accordance with his intentions, and if he did not do this, third parties would not be affected; on the other hand, if he did not intend it to become a bill, there would be no such duty incumbent upon him, and he would be in the same position as if he had signed it as an autograph. There would, in that case, be no *animus emittendi*, and he would, therefore, not be liable for the act of a bailee who turned the document into a negotiable instrument. The present case sharply raises the question of the line of demarcation, and, as I think that the signed forms were in the possession of Telfer, as custodian only, and not as the defendant's agent with an intention on the defendant's part that he should issue them as promissory notes, the defendant is not estopped from saying that he was not the maker of the notes sued upon.

Mr. Bicknell, in his able argument, naturally invoked the famous *dictum* of Ashurst, J., in *Lickbarrow v. Mason*, 4 Bro. P. C. 57; 1 R. R. 425. But that *dictum* can be safely made the ground of decision in particular cases only in so far as it has taken shape in the form of a definite principle of law. *Farquharson v. King*, [1901] 2 K. B. 697, at pp. 336 and 337; *Rimmer v. Webster*, [1902] 2 Ch. 163, at p. 169; *Scholfield v. Landesborough*, [1896] A. C. 514, at pp. 521 and 522; *Colonial Bank v. Marshall*, [1906] A. C. 559, at p. 565; *Imperial Bank v. Bank of Hamilton*, [1903] A. C. 49, at p. 54:—

“My Lords,” said Lord Cairns, in *Cundy v. Lindsay*, 3 App. Cas. 459, at p. 463, “You have in this case to discharge a duty which is always a disagreeable one for any Court, namely, to determine as between two parties, both of whom are perfectly innocent, upon which of the two the consequences of a fraud practised upon both of them must fall. My Lords, in discharging that duty, your Lordships can do no more than apply rigourously the settled and well known rules of law.”

Two further points require notice. First, as to estoppel, it is very clearly shewn in the judgment of Mr. Justice MacLaren that the appellants have suffered no prejudice in consequence of the respondent's silence after becoming aware of the forgery, the appellants cannot succeed on that basis. Secondly, as Thompson neither intended nor professed either in committing the forgery or in negotiating the forged instrument to be acting for the respondent, the doctrine of ratification by acquiescence alone has no application. *Hebert v. La Banque Nationale*, 40 Can. S. C. R. 458; *Keighley v. Durant*, [1901] A. C. 240, at pp. 246 and 247.

HON. MR. JUSTICE ANGLIN:—The material facts of this case and the substance of the evidence bearing upon them are fully and satisfactorily set out in the judgment of the learned Chief Justice of Ontario and MacLaren, J.A., 24 Ont. L. R. 122. The evidence is most unsatisfactory on the two principal questions of fact involved—the one, whether the blank note form with his signature upon it was handed by the defendant to his agent Thompson merely as a depository or custodian, with instructions not to fill it in or use it in any way until directed to do so by the defendant, or whether, without any further assent of the defendant, he had some authority to fill it in and to use it on the defend-

ant's account; and the other, whether the plaintiffs took the note with serious suspicions of Thompson's good faith, which they made no effort to clear up, thus failing to discharge the burden cast upon them by sec. 58 of the "Bills of Exchange Act." It would perhaps be difficult to say upon which point the evidence is less convincing. The observations upon it of the learned Judge of the Court of Appeal are fully justified.

But on the question of the nature of Thompson's mandate in respect of the paper signed in blank which was entrusted to him, although as a trial Judge I should probably have found against the defendant, for the reasons given by Moss, C.J.O. and Maclaren, J.A. I am of the opinion that the finding of Clute, J., that Thompson was a mere custodian of it with no authority to use it until directed to do so by the defendant was rightly affirmed in appeal. Moreover, where such a judgment has been affirmed by a provincial appellate Court it is the settled practice of this Court to decline to interfere unless the appellant clearly demonstrates that the conclusion reached is absolutely wrong. *Weller v. McDonald*, 43 Can. S. C. R. 85; *Mayrand v. Dussault*, 38 Can. S. C. R. 460, 465; *Matthews v. Bouchard*, 28 Can. S. C. R. 580. See, too, *Johnston v. O'Neil*, [1911] A. C. 552, at p. 578, per Lord Macnaghten. In their attempt to perform that difficult task the present appellants have not succeeded.

As a mere custodian of the paper, Thompson, in fraudulently filling it in and using it, did not merely abuse or exceed his authority; he acted without any authority. In either case at common law the defendant could be made liable only by estoppel: *Nash v. De Freville* [1900] 2 Q. B. 72, 89. But the estoppel against the principal which arises in a case of abuse or excess of authority by his agent—of which *Lloyd's Bank, Limited v. Cooke*, [1907] 1 K. B. 794, furnishes a recent instance—lacks its essential basis where the alleged agent, entirely without authority, disposes of a non-negotiable security or fills in and disposes of a document thus converted by his wrongful act into what is in form a negotiable instrument. In order to sustain the confidence of the commercial community in the title obtained by the bona fide holder of a negotiable instrument, it has been conclusively established that, if the maker or owner of it entrusts it in complete and negotiable form to a broker or agent, a person taking it from him for value and in good faith—although in parting with it he acts without any authority or in breach of express instructions—acquires an

incontestable title and right of property. *London Joint Stock Bank v. Simmons*, [1892] A. C. 201. But the person who merely deposits with a custodian a blank form of note bearing his signature does not issue it "intending it to be used." *Baxendale v. Bennett*, 3 Q. B. D. 525, 531-2. The deposit is in fact of a non-negotiable document and, therefore, does not "contain any invitation to any other member of the community to do any act from which a duty to him can be inferred." *Lloyd's v. Grace, Smith & Co.*, [1911] 2 K. B. 489, at pp. 509-10:—

It is of the very essence of the liability of a person signing a blank instrument that the instrument should have been handed to the person to whom it was in fact handed, as an agent for the purpose of being used as a negotiable instrument and with the intention that it should be issued as such.

Smith v. Prosser, [1907] 2 K. B. 735, at p. 744, per Vaughan Williams, L.J.:—

"The promissory notes never became negotiable instruments, the reason being that the defendant never issued them nor authorized any one else to issue them as negotiable instruments."

Ibid, per Buckley, L.J., at p. 755:—

"If we are to measure the estoppel by the physical possibility of deception, sec. 20 of the 'Bills of Exchange Act' (our sec. 31), would contain something which would be absolutely irrelevant, and which yet is made a condition of the section being applicable. That section commences with the words: 'Where a simple signature on a blank stamped paper is delivered by the signer in order that it may be converted into a bill;' in other words, the intention that it shall be converted into a bill is made a condition of the operation of the section. In my opinion sec. 20 is based upon the doctrine of common law estoppel as it existed at the date of the Act, and, therefore, the presence of the condition as to its operation shews that the Legislature realized that the intention that the document should be converted into a bill of exchange was essential in order to render the maker liable. In other words, both the common law and the statute realized the possibility of two rival dangers—on the one hand, a person who did nothing more than sign a blank stamped paper might find himself in the position of being the maker of a bill or note; on the other hand, a man might issue an incomplete bill or note and place it in the hands of an agent with a limited authority to fill it up, and the agent

might fill it up without due regard to the limitations of his authority and put it in circulation and thereby injure innocent persons. They, therefore, drew the line as regards the protection of third parties in the following very reasonable and intelligible way: if the signer intended it to become a bill, it was for him to see that it was issued in accordance with his intentions, and if he did not do this, third parties would not be affected; on the other hand, if he did not intend it to become a bill, there would be no such duty incumbent upon him, and he would be in the same position as if he had merely signed it as an autograph. There would in that case be no *animus emittendi* and he would, therefore, not be liable for the act of a bailee who turned the document into a negotiable instrument."

Ibid, per Fletcher Moulton, L.J., at pp. 753-4:—

"Although *Smith v. Prosser*, [1907] 2 K. B. 735, might undoubtedly have been disposed of on other grounds, we must accept it as an authority for the propositions of law on which the Lords Justices have seen fit to rest their opinions. *New South Wales Taxation Commissioners v. Palmer*, [1906] A. C. 179, 184."

Apart from the effect of the proviso to sec. 32, upon which great stress was laid in argument, the case against the defendant fails.

Assuming the plaintiffs to be "holders in due course," I agree with the construction put upon that proviso by MacLaren, J.A., who said:—

"It is argued that here the plaintiff can recover as a holder in due course under the proviso of sec. 32, which provides that 'if any such instrument after completion is negotiated to a holder in due course, it shall be valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up within a reasonable time and strictly in accordance with the authority given.' It will be observed that this applies only 'to any such instrument,' that is, to such instrument as is mentioned in sec. 31, and one which has been 'delivered by the signer in order that it may be converted into a bill,' and does not apply to an instrument like this, delivered to a bailee or custodian merely to be held until further instructions are received from the signer. It is not pretended that such instructions were ever given, so that the instrument never became a note for want of a proper delivery."

I concur in the opinion of the majority of the learned Judges of the Court of Appeal that "there is nothing in the subsequent conduct of the defendant to create liability," either by ratification or by estoppel.

The appeal, in my opinion, fails.

HON. MR. JUSTICE BRODEUR:—I concur in the views expressed above by Mr. Justice Anglin.

Appeal dismissed with costs.

J. E. Swinburne, for the appellants.

T. H. Lennox, for the respondent.

DIVISIONAL COURT.

FEBRUARY 9TH, 1912.

DE STRUVE v. McGUIRE.

Intoxicating Liquors—Action against Hotel Keeper for Death of Intoxicated Person—Under R. S. O. (1897), ch. 245, sec. 122 — Liability of Hotel Keeper for Sale by Bartender.

An action under sec. 122 of the Liquor License Act, R. S. O. ch. 245, by the administrators of the estate of John Pundzius, deceased, for damages for the death of the said John Pundzius.

TEETZEL, J., *held*, 25 O. L. R. 87, 20 O. W. R. 374, that the evidence shewed that the proximate cause of the death was from being intoxicated caused by excessive drinking in defendant's hotel, and under authority of

Scott v. Sheppard, 2 W. Bl. 892, 1 Smith, L. O. 11th ed. 454, defendants were liable. Damages assessed at \$500. Costs on H. C. scale.

DIVISIONAL COURT dismissed defendant's appeal with costs.

An appeal by the defendants from a judgment of HON. MR. JUSTICE TEETZEL, 20 O. W. R. 374, 25 O. L. R. 87.

The appeal to Divisional Court was heard by HON. SIR JOHN BOYD, C., HON. MR. JUSTICE LATCHFORD and HON. MR. JUSTICE MIDDLETON.

J. Haverson, K.C., for the defendants, appellants.

G. H. Watson, K.C., for the plaintiff, respondent.

THEIR LORDSHIPS (V.V.), at the close of the argument dismissed defendants' appeal with costs.

HON. MR. JUSTICE MIDDLETON. JANUARY 23RD, 1912.

GREER v. GREER.

*Action—Stay of Proceedings—Action Pending in Foreign Court —
Parties and Causes not Identical—Trust Account—Payment —
Pleading—Motion to Strike out Statement of Claim Dismissed—
Costs to Plaintiff.*

Motion by the defendant, A. B. Greer, to stay this action pending the trial of an action in Arkansas, and in the alternative for an order striking out paragraphs 9c and 9d. of the statement of claim on the ground that according to the law of Arkansas the plaintiff has no right to maintain this action.

R. Bayly, K.C., for the applicant.

G. N. Weekes, for the plaintiff.

T. G. Meredith, K.C., for the B. W. Greer estate.

J. B. McKillop, for W. H. Wigmore.

HON. MR. JUSTICE MIDDLETON:—The allegations in the statement of claim, so far as now material, are that certain lands in Arkansas were held by the late B. W. Greer in trust for the late J. H. Greer and A. B. Greer. Some of these lands were sold and the proceeds were received by B. W. Greer and deposited in the bank account of the firm of which he and Wigmore are partners. The unsold lands were conveyed to A. B. Wigmore in trust.

The executor of J. H. Greer now seeks an account and payment.

The action in the Arkansas Court is not by the same plaintiff. The beneficiaries under the will of J. H. Greer, claiming as his heirs, allege the trust and ask that it may be declared.

The question of law suggested is this:—

J. H. Greer, domiciled in Ontario, by his will appointed M. A. Greer and M. H. Greer his executors and devised his property real and personal to them in trust.

M. H. Greer renounced and probate issued to M. A. Greer alone. This probate has been recognised by the Arkansas Courts.

M. H. Greer disclaimed as trustee and refused to act.

It is said that according to the law of Arkansas where the land is, when one of two trustees disclaims the land does not vest in the other. The affidavit is not candid because it does not go on to explain what should be done. I would infer that a new trustee to take the place of the disclaiming trustee should be appointed.

I cannot see what this has to do with either action. The land is vested in A. B. Greer and it is asked that he be declared a trustee.

So far as accounting is concerned, the Court here is by no means impotent, and if necessary a new trustee can be appointed so that the defendants can be adequately protected.

So far from being any reason for the staying of the action, the ground suggested is so flimsy and dilatory merely, that it affords the strongest reason for allowing the action to proceed.

The motion against the statement of claim as pointed out on the argument is misconceived because the rules only contemplate a motion based on the pleading itself, but quite apart from that from what has been said indicates that this may be found to be no defence at all. I do not determine this as much clearer evidence as to the law of Arkansas must be given.

Motion dismissed. Costs to the plaintiff in any event.
Defences to be filed in 4 days.

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HON. MR. JUSTICE MIDDLETON. FEBRUARY 9TH, 1912.

DURYEA v. KAUFMAN.

Patents—Invention for Perfecting Starch Products—Patents Secured in Canada and the United States—Agreements Oral and Written with Company—Plaintiff Alleged he had Performed all that he was Bound to do under Agreements—That Defendant Company had Taken Advantage of his Discoveries but Refused to Carry out their Obligations—Action for Breach of Contract, an Account of Profits, an Injunction against Infringement of Patents, for Royalties and a Declaration that Defendants were not Entitled to make use of his Inventions.

MIDDLETON, J., found in favour of plaintiff and entered judgment for \$4,926.53. Case of facts and evidence. See S. C. 16 O. W. R. 57, 809, 913; 17 O. W. R. 626, 1055.

N. W. Rowell, K.C., and Casey Wood, for the plaintiff.

D. L. McCarthy, K.C., and Frank McCarthy, for the defendants.

HON. MR. JUSTICE MIDDLETON:—It has taken four weeks to try this action, and, though assisted by able counsel, the task of reducing the mass of evidence given at the hearing to anything like harmony and order is not easy.

The contest is really between Duryea and the Edwardsburg Starch Company. The position of Kaufman gives rise to questions of difficulty and importance but these are quite subsidiary to the main contest and I place these on one side for the present. Out of the relationship of the parties arising from the elaborate, and in some respects not easily understood, agreement of 24th January, 1906, and a subsequent agreement or rather series of agreements made in November or December, 1908, and not reduced to writing, have arisen a number of disputes which can be best understood if the scope of the agreement as a whole is first grasped.

Duryea is a chemist, for many years intimately connected with the manufacture of starch and starch products in the United States.

The Edwardsburg Company manufacture starch and starch products in Canada. Their main works are at

Cardinal. Mr. Benson is the president and managing director of this company, and throughout the transactions acted for it.

Duryea, having great skill and knowledge of starch processes and having then patented certain processes and having then under way certain investigations which he looked upon as likely to result in further patentable inventions sought an opportunity for research and for the exploiting of his inventions in such a way and on such a scale as would demonstrate their value. The American starch industry is so vast that any improvement which can be covered by a patent, if demonstrated to be of commercial value means a fortune to the inventor.

To secure this opportunity he sought an agreement with the company. The company on its part desired to have the assistance of this expert chemist and desired to improve the quality of its output particularly in the manufacture of starch syrups or glucose.

The agreement which resulted recites that Duryea "represents that to the best of his belief he owns and possesses certain Canadian patents, special processes, products, knowledge and skill pertaining to the starch and starch syrup industry which he wishes to commercially exploit in Canada," and that the company "desires to acquire the Canadian rights and benefits of the said patents, special products, knowledge and skill." It is then agreed that the company shall furnish and supply Duryea "with suitable manufacturing and other facilities necessary for the said Canadian exploitation," and that Duryea "shall give to the company the use and benefit of said patents and shall disclose, establish, develop and apply said patents, special processes, products, knowledge and skill for the benefit of the company according to the following conditions and terms." Then there follows, under the heading of "conditions" ten sections each subdivided into clauses defining the precise terms and limitations of this general bargain. Some of these "conditions" must be considered in detail when the controversy is developed. At present I propose to mention them in a general way only.

Section I. deals with the obligations of the company under its agreement to supply "suitable manufacturing and other facilities."

By clause 1. Space, machinery, &c., are to be supplied for the operation of the processes already patented, i.e.,

modified starch, small granule maize starch, (the latter at the option of the company.)

By clause 2. Duryea is to instal the necessary plant to manufacture 500,000 lbs. annually of modified starch. The plant to be his property till he is reimbursed the cost.

By clause 3. This reimbursement must be made by 1st October, 1908, should the company desire to continue to manufacture modified starch under Duryea's process or to use his apparatus.

Clause 4 relates to small granule maize starch and is of no importance in this litigation as the company elected under the option in clause 1 not to proceed with its exploitation.

Clause 5 makes it plain that the company need not manufacture under these processes unless it so desires.

Section II. provides for the establishment of a private laboratory for Duryea. This was to be free from intrusion by the company's employees and to be installed by Duryea at his own expense. This section relates to one important minor issue to be dealt with later.

Section III. deals with the development of the starch syrup processes and is of importance.

By clause 1 Duryea is to complete his starch syrup processes in his private laboratory.

By clause 2 (which must be considered in detail hereafter) upon a successful demonstration in the laboratory, a commercial demonstration is to be had at Mr. Duryea's expense, and if the company decide to manufacture they must reimburse him the cost of apparatus installed for the purpose of that test.

By clause 3 the company may require Duryea to instal apparatus for commercial manufacture.

By clause 4. If company does not desire after demonstration to manufacture then they forego rights in process.

By clause 5. If the company regard the process as commercially successful then they may acquire Canadian rights. This right to be exercised in 3 months after demand.

By clause 6 (which must also be considered later). The company have the right to acquire the Canadian rights agreeing to pay royalty.

Section IV. provides for the employment by Duryea of an assistant chemist. This question of a confidential assistant was the rock upon which the amicable relationship of the parties was wrecked.

Section V. deals with Duryea's obligation in the manufacture of his special products or the company's obligations in marketing.

By clause 1 Duryea guarantees satisfactory results. Upon breach of this guarantee he may be dismissed.

By clause 2. Duryea is given supreme authority in the manufacture of these products from candé green starch till packed for market.

By clause 3. The company must use fair and energetic trade methods to market.

Section VI. Provides that the company have a general right of consultation with Duryea.

Section VII. Headed "Terms."

Clause 1. The contract is to expire 31st December, 1908.

Clause 2. While Duryea is to work zealously, &c., he is not to be continuously upon premises. He expects to be absent "at least eight weeks per year."

Clause 3. Duryea is to have a salary of \$2,000 per annum and a royalty of 5 cents per hundred pounds on all special or modified starch products in excess of 500,000 lbs. per annum.

Clause 4. Duryea shall have access to books and may visit customers to promote sales.

Clause 5. All process worked out during engagement may be used without remuneration during term of agreement.

Section VIII. At the expiration of agreement Duryea shall on certain terms convey Canadian patents.

Clause 2. Company may license use under patents but must then pay royalty on aggregate output.

Clause 3. Company may cease to pay royalty on reconveying to Duryea.

Clause 4. Duryea may control litigation with infringers.

Section IX. Company may retain Duryea after expiry of agreement for 1 year at \$1,000 as consulting chemist.

Section X. Agreement to bind assigns and provision for strikes.

In this summary I have not in any way attempted to construe the agreement or to deal with any matter in controversy.

To understand this agreement and to appreciate what was done under it, it is necessary to know the mode of manufacture of starch products at that time in general use and in use at Cardinal.

It is also necessary to know something of the condition of the starch and glucose market so as to understand what was aimed at by the contemplated improvements in manufacture.

For the American market starch is almost exclusively made from maize, and the evidence before me was confined to the manufacture of corn starch.

The corn kernels are first steeped and then crushed so that the oily germs can be removed and the remaining material is then ground and passed over sieves which permit the starch granules to pass through mixed in water as what is known as "starch milk." The tailings from the sieves is known as "wet feed" or "slop" and contains all the coarser impurities the hull and fibre of the corn and with its fate we are not concerned.

The "starch milk" is passed over "runs" upon which the crude green starch is deposited by gravity and the water with any suspended impurities is drained off.

These "runs" are tables or flat troughs some 5 or 6 feet wide and 200 feet long having a very slight incline. The starch milk is run on these and passes the entire length and as the starch is slightly heavier than water it sinks and forms a deposit on the table before the flowing water reaches the end of the run by which time all the starch is supposed to be removed from the milk.

This preliminary process does not become the subject of much consideration in the controversy. Two points need to be noticed. The preliminary steeping process is generally what is known as an "acid steep," sulphurous acid being employed. This serves to swell and soften the grain so as to facilitate subsequent crushing and separation from the germs and the grinding and separation of the granules from the fibre, &c., of the grain, but the acid has a greater and very important function, it renders soluble certain impurities and these are dissolved and to some extent removed in the warm steep water and are further taken away in the water used in the washing in the running of the milk through the sieves and over the runs.

The other point to be kept in mind is the importance of the starch granules being all deposited on the run. If for any reason these fail to deposit they are lost.

The exact nature of the starch granule is even yet the subject of some uncertainty. The granules are found as part of the contents of certain vegetable cells. The starch

granules obtained from various plants differ in form and size and in some other respects. The granules of maize starch vary from to in diameter.

By some, the granule is said to be covered by an enveloping tissue of starch cellulose—some deny the existence of any separate enveloping tissue and it is clear that the tissue if it exists cannot be separated from the contents of the granule by any defined line of cleavage. This starch cellulose is isomeric with the starch.

The contents of the granule are not uniform and are deposited in layers round a point known as the hylum. This point is seldom exactly at the centre of the granule and the layers round it are not of uniform thickness.

When the granule is examined under a microscope by polarized light a well defined Maltese cross is seen, the central point being the hylum. Some portions of the granule are much more soluble than others and when the granule is broken either by heat or mechanically these first pass into solution. So long as the granule remains intact practically no solution takes place.

Chemically (according to some) the starch granule consists of a highly condensed hexose carbo-hydrate having the formula $n(C_6H_{10}O_5)_n$ having a value of about 100.

More probably the granule is really far more complicated and consists of an aggregation of a very large number of somewhat differing and yet somewhat similar substances some of which are anhydride and some of which are slightly hydrolysed and some of which have a much greater affinity for water than others.

The starch granule itself is in one sense colloidal or pasty in its nature and when heated it bursts and forms a paste. For convenience this condition is called starch paste to distinguish it from the condition in which the granules still retain their granular condition.

There is much room for discussion upon the question whether and if so under what conditions these starchy matters form a true solution but this does not affect the result of this inquiry.

Reverting now to the starch granules deposited upon the runs. These form the basis for the manufacture of modified starch and glucose. If removed from the run, dried and "broken" the crude green starch is the "mill starch" of commerce—and for long this mill starch was the end and aim of the manufacturer

This mill starch was used by laundries to impart stiffness to linen and was also used by textile manufacturers for a similar purpose.

So long as linen sent to a laundry was "ironed" by hand this did well enough. The starch was mixed with water, some 12-14 oz. to the gallon and boiled. The linen was dipped in this paste and when ironed a glossy surface was formed.

When "steam" processes were introduced into the laundry this was found objectionable. Starch from other sources was found to be "thin boiling," a thinner paste was formed which sank into the fabric, and on ironing the fabric was found to be stiff and the surface was of a more pleasing nature. No such result could be obtained by the use of the mill starch prepared from corn by any mode of laundry manipulation. (A thin, boiling starch was found to have value in the confectionery trade—for the sake of simplicity I do not deal with this.—The laundry trade indicates the situation well enough). To meet this situation the corn starch manufacturer sought to prepare a thin boiling starch from corn, and ultimately found that by prolonged acid treatment the corn starch was made thin boiling. This process, known as the "drying in process," is as follows: The crude green starch is taken from the runs and a dilute mineral acid is added and the acid starch is then slowly allowed to dry in a heated kiln this drying taking generally some days. In the result the starch produced has become a modified or thin boiling starch. This starch can be used by laundries as an equivalent for wheat starch.

This starch was upon the market on 31st December, 1901, when Mr. Duryea obtained his patent for the manufacture of "thin boiling or modified starch"—by the in suspension process.

This term "modified" had not then been applied to starch. Duryea says that he was the first to use it and no trace of its earlier use has been found. While the term is convenient and scientific it cannot be said to have any real meaning as applied to starch before this patent.

"Modify" according to Murray, may mean "to make partial changes in, to change (an object) in respect of some of its qualities, to alter or vary without radical transformation"—and no doubt this is the sense in which the term is used.

There has been much discussion as to the exact meaning of the expressions "modified starch" and "thin boiling starch" the plaintiff contending that starch that is in any degree changed has become "modified" and that if the change has resulted in reducing the viscosity to any extent below the viscosity of the crude green starch this has made the starch a "thin boiling starch." The defendant on the other hand contends that these terms are synonymous and both indicate a starch of such fluidity as to be known to the laundry trade as thin boiling, i.e., having what has been called a degree of viscosity of 40 or less.

The true view can, I think, best be determined after a consideration of the patents in question.

The plaintiff originally claimed an injunction restraining the infringement of this patent by the defendant, and the defendant in answer set up a license or agreement to license and in the alternative that the patent was invalid. The plaintiff denied that the agreement to license was binding, and claimed any right to manufacture had been lost by the defendant's defaults. An order was made by the Master-in-Chambers permitting the plaintiff to amend by withdrawing his claim to an injunction based on the allegation of infringement, without imposing any terms as to admission of the invalidity of the patent and the plaintiff then contented himself with a claim for a declaration that there is no license subsisting entitling the defendant to use the patented process. I think this order was improvidently made and that the Master ought not to have permitted this claim once made to be withdrawn save upon terms amounting to its abandonment—but; as it is, this claim can now be raised in a substantive action. On motion made at the trial I was compelled to strike out the defendant's counterclaim asking a declaration of the invalidity of the patent as this Court has no jurisdiction to declare a patent invalid save as an incident to a defence in an action for infringement.

Nevertheless this patent must be carefully considered when the branch of the case relating to glucose comes to be dealt with.

So far as modified starch is concerned on the record as it stands the dispute has become comparatively simple.

Leaving out of consideration for the present any complication arising from Kaufman's position the situation is this.

Duryea established the necessary plant, machinery, &c., to manufacture starch according to his in suspension process, and demonstrated, to the satisfaction of the defendant company, its commercial value, and starch has been and still is manufactured under this process and sold as "Diamond D."

Under section I. clause 3. the company desiring to use this process so notified Duryea, and on the 1st October, 1908, reimbursed him the cost of his outlay by the payment of \$1,000. This gave the company the right at the expiration of the agreement to an assignment of the Canadian starch patent or a license to manufacture under sec. 8 clause 1. subject to payment of royalty. Two questions arise upon this clause the discussion of which can best be postponed—the form of the grant or license, and the amount of the royalty to be paid.

The plaintiff denied the right of the company to the license because he claimed that the company had failed "to apply fair and energetic trade methods in marketing" this Diamond D. starch. It was well established that fair and energetic trade methods were used and upon the argument it was admitted that this contention absolutely failed.

On 25th March, 1911, a notice was served purporting to cancel any rights under the agreement by reason of the failure to pay royalties.

As the action was commenced on 18th November, 1909, for the purpose inter alia of having it declared that the company had no right to a license it is obvious that this notice cannot be relied on for two reasons: (a) because the plaintiff's rights must be ascertained and declared as of the date of the writ, and at that time no royalty was due; (b) because the plaintiff had denied and by his action was denying the right to a license and this excused the company from making any tender of the royalty.

The agreement for a license, upon the principle established in *Walsh v. Lonsdale*, 21 C. D. 9, was equivalent to a license and the company was therefore entitled to manufacture and sell the modified starch.

In the manufacture of this modified starch knowledge and skill not to be acquired from the patent itself are necessary in order to enable the company to obtain the best results. The nature of this special knowledge and skill was not disclosed upon the hearing but it was said that it related to certain secret testing methods necessary to en-

able any predetermined degree of modification to be readily and accurately obtained.

This is the very thing which Duryea agreed to give to the company—the agreement provides that he “shall disclose . . . special processes . . . knowledge and skill for the benefit of the company.” Duryea has not in any way carried out this obligation. Upon the hearing, or rather during the argument, his counsel said that he was ready to do so. If he, within a time to be limited, makes the necessary disclosure to the company so that the patents may be successfully operated then the only question will be the damage already sustained by the company. These I assess at the sum of \$750, plus the loss of any royalty on this output. If he fails to make the disclosure then he must answer in damages and a substantial sum will be awarded. If the parties cannot now agree as to the time and mode of the disclosure of these secret processes, I may be spoken to.

This clears the way for the consideration of the questions arising upon the agreement and patent re glucose processes.

At the time of the agreement the company was having much trouble in the production of a satisfactory glucose. The enactment of the “Pure Food Law” of the United States had disturbed the situation in the United States. Inferior glucose had been made marketable by treatment with sulphites—this “dope” as it was called improving the colour and neutralizing or concealing certain objectionable flavours and odors. This was prevented by the pure food law. Duryea sought to get over this difficulty by improving the method of manufacturing glucose and also thought that he might be able to manufacture maltose in a way that would give a syrup of greater purity and value as a food product and at an expense which would make it a commercial success and so enable it to supplant glucose in the market. Glucose had been manufactured from crude green starch taken from the runs. This starch mixed with water to a fairly thick cream is mixed with hydrochloric (muriatic) acid and these treated under a steam pressure until “conversion takes place. The resulting product is “light liquor” and this after filtration, neutralization and condensation by evaporation becomes the finished glucose of commerce.

In the evidence these processes are detailed at length, and there is pointed out the difficulty incident to the manipulation of the suspended starch and of determining exactly when conversion has proceeded far enough, so that the exact point may be determined when the "charge" has been sufficiently treated so that all the starch shall be reduced to glucose and the glucose shall not be spoiled by "over conversion." When this point is determined the "charge" is blown from the converter and carried on for further treatment. The time necessary for conversion depends on many factors. The exact condition of the starch—for crude green starch is by no means a uniform product, and the exact degree of acidity, etc., etc., and in factory operation it is not practicable to obtain such a uniformity in all conditions as to make it possible to fix in advance the time during which the acid starch is to be treated in the converter. In order to ascertain how far conversion has proceeded samples are taken from the converter and are tested with iodine, and so, the progress of the process is watched, and the time when the charge is to be blown is ascertained.

The acid used in the conversion forms no part of the finished glucose. What takes place is an acid hydrolysis. The acid is a mere hydrolyte or catalytic agent, and after its function has been discharged the first step in the process is to remove it by neutralization.

The glucoses are an isomeric series having the common formula, $n (C_6 H_{12} O_6)$ equal to $n (C_6 H_{10} O_5 + H_2 O)$, or in other words the result of this acid hydrolysis has been the hydration of the original starch by the addition of one molecule of water. The factor N . in this formula is probably very much smaller than the corresponding factor in the starch formula.

In the manufacture of modified starch while the starch granule remains intact the process which ultimately results in the production of glucose is begun, and at a very early stage is arrested.

As the result of Duryea's investigations he determined to substitute modified starch for crude green starch in the glucose process, and in his patent of 25th June, 1907, for a new and useful "Process of Manufacturing Glucose," he describes his invention as "submitting a modified starch to the action of an acid to convert it into glucose and subsequently neutralizing the acid and refining the product."

From what has been said it is quite clear that the only element of novelty when this process is contrasted with the well known mode of manufacture is the use of a modified starch in the place of a crude green or mill starch.

There is no disclaimer of the neutralization and refining as well known processes, but I do not think this necessary and subject to what has to be said as to novelty and utility, this is a clear statement of what Mr. Duryea then intended to claim as his invention. The meaning of the term "a modified starch" will also have to be discussed.

This statement of invention is followed by a statement of the procedure in practice. Before considering this statement in detail the claims should be referred to. They are (1) "The process of manufacturing glucose consisting in providing a purified thin boiling or modified starch in a state of free flowing suspension in water, converting the mass by heating it with dilute acid under pressure neutralizing the acid and subsequently refining and concentrating the product."

And (2) "The process of manufacturing glucose consisting in providing a thin boiling or modified starch in a state of free flowing suspension in water converting the mass by heating it with dilute acid under pressure neutralizing the acid and subsequently refining and concentrating the product so that in the main converting influences act concurrently and uniformly upon all the starch in any given conversion."

It will be seen that each of these claims departs from the original statement of the invention.

Leaving out the statements as to conversion and subsequent treatment, which are not novel, and the statement that the starch when converted was to be in a state of free flowing suspension in water, which is not novel, the first claim is reduced to the use of "a purified thin boiling or modified starch."

The second claim treated in the same way, and leaving for subsequent consideration the words following "so that" is for the use of "a thin boiling or modified starch."

I have come to the conclusion that in this patent the words "thin boiling" and "modified" are to be regarded as synonymous, and that in clause 1, the word "purified" must be regarded as qualifying "starch," and that this claim is for a starch which has been made thin boiling (or modified), and has then been purified.

I find nothing in the statement of the invention to justify any claim for a purified starch as distinct from a modified starch.

In the statement of practical procedure the starch to be used is said to be "modified to a thin boiling point when it may be raised to a density of about 16° Baumé, by the addition of water, and its paste still remains so thin as to be readily stirred when heat is applied." Then it is said "The starch is preferably so modified as to incidentally free it from impurities." This is the only place in which purification is mentioned in the patent, save in the claim. The degree of modification contemplated is shewn by the gravity given 16° Baumé, which shews the amount of starch. This starch must be modified to such an extent that when heated the paste formed from starch of this density will be sufficiently thin to be readily stirred—experiment has shewn that this requires a starch modified to 80°.

From this it is clear that the word when used in the phrase "preferably so modified, etc.," means "in such a manner," and not to "such a degree." I think the mind of the inventor had reverted to his own in suspension process for the manufacture of modified starch which with its incidental washings and purification would provide a more satisfactory material than modified starch prepared by the drying in method.

What bearing has this statement in the course of the description of "the procedure in practice" of a preference for one kind of raw material, or for material prepared in some particular way? Can it be regarded as a sufficient claim of invention? I think it cannot. I think that if this purification were regarded as an essential part of the invention it was incumbent upon the patentee to claim it in so many words. There is not in my view anything in the statement of the invention upon which the first claim in the patent can be founded. What has been discovered is a mode of manufacture which "consists in submitting a modified starch" to the process formerly used for mill starch; this does not justify a claim for a monopoly in the use of "purified thin boiling or modified starch."

If the statement of the invention and first claim only are looked at one would be strongly inclined to regard "a purified thin boiling starch," as synonymous with "a modified starch," but the second claim speaks of "a thin boiling or

modified starch," and the practical process speaks of a modified starch so prepared as to free it from impurities.

Dealing then with the second claim—Had it ended before the last clause (commencing with the words "so that") I would have regarded it as a claim properly founded upon the antecedent statement of invention. In fact this is the only claim the foregoing statement justifies—but the words "so that" must be taken (as indeed the plaintiff contends), as equivalent to "in such a manner that," and the whole claim must, as the plaintiff says, be construed as being a claim for the use of thin boiling or modified starch in such a way that in the main converting influences act concurrently and uniformly upon all of the starch in any given conversion.

The plaintiff justifies this claim upon the statement in the practical procedure set out in his patent immediately following the statement that the starch should be "preferably so modified as to incidentally free it from impurities," "and the conversion is so conducted so that in the main converting influences act concurrently and uniformly upon all of the starch in any given conversion."

There is no doubt that it is to some degree advantageous to have concurrent action upon all the starch, but if it is intended to patent any method by which this end can be attained the inventor must describe the method in detail and must claim this as his invention.

If the use of the modified starch is for the purpose of securing a less viscous paste and so making it easier to secure the uniform action of converting agents then this should have been pointed out in the earlier part of the patent, and it would not appear as part of the claim, but as one of the advantages of the process described.

The description of the process in the patent where it is said "the conversion is so conducted" as to secure this must preclude the contention that the modified starch is substituted for the green starch for the purpose of securing this end.

When the starch in suspension (with the acid added or without), is being introduced into the convertor the heat is applied by discharging into the mass live steam heated far above the boiling point. If the starch is run in too fast this makes a thick paste and the convertor "freezes." The starch is desired to be of as high a gravity as possible so as

to necessitate as little evaporation as possible in the subsequent condensation so the use of a thin boiling starch with its less viscous paste is advantageous in permitting the convertor to be more quickly filled with a starch suspension of higher Baumé.

The converting agents are heat and the acid; or, more accurately, in this process, the acid is the sole converting agent of value, but this acid produces its results more rapidly at a high than a low temperature. It is pointed out that the "suspension" first introduced to the convertor is subject to this action for a longer period than that last introduced, and that the use of modified starch by which the time for charging the convertor can be cut down from 10 minutes to 5 minutes, is a matter of importance because this inequality is correspondingly reduced and more uniform results should be obtained. The time needed for conversion after the convertor is closed is 25 to 30 minutes.

The convertor is open during the charging and when closed the pressure is increased to 30 lbs. (gauge) and the temperature is thus raised to 135 cent. The elevation of temperature vastly accelerates the rapidity of the chemical changes—according to Dr. Rolph they are 20 times as rapid in the closed as the open convertor, and the 5 minutes before the convertor is closed is only equal to 15 seconds in the closed convertor and is not a matter of any great moment.

I do not think the use of modified starch can be said to have any great advantage from this standpoint.

The patent being invalid for the reasons indicated, I might rest my judgment upon this branch of the case here, but the parties desire and are entitled to my findings upon the different matters dealt with upon the evidence and in argument. The question much discussed before me as to the exact meaning of the term "modified" or "thin boiling" can now be conveniently dealt with.

In determining the degrees of viscosity (or fluidity) of a starch paste, two distinct methods are in use. The method generally employed is to make a past from the starch in question, using for the purpose of comparison a certain fixed quantity pasted in a fixed quantity of water. This paste is then allowed to pass through a "pipette" or small funnel having a fine discharge so regulated that 100 drops of water will pass and drip from it in 70 seconds. If the paste is thick one or two

drops only will pass, if the paste is thin 40 drops will pass as in the case of "Diamond D," or "Laundry 40," or 80 as in the case of "Laundry 80," and 92 in the case of "Chinese Special," a very fluid special starch. This test was the one in almost universal use before Mr. Duryea's more accurate and improved laboratory methods came into use, though Dr. Rolph describes the other method in a published text book very widely known as a laboratory manual. This method despite its crudity in some respects gives reasonably accurate results, but is not suited for noting minute variations. In this method as the fluidity increases the degrees increase.

The other method is the use of the "Doolittle Torsion Viscosimeter," an instrument widely known in testing the viscosity of oils. In this the paste is placed in a vessel and a weight is suspended in it. The wire by which this weight is suspended is given a twist of one complete revolution. The weight is released and swings upon its axis and the amount of its retardation at the end of one complete (double) vibration is noted and the angular degrees between its initial position and the position at the end of this vibration is taken as indicating the viscosity of the fluid. The greater the viscosity the greater the retardation. In this the readings are the reverse of the readings upon the other instrument, the increase of fluidity decreases the numerical reading. In other words this instrument may be said to give degrees of viscosity and the other degrees of fluidity.

It is to be noted that the results of the readings by either method are comparative only and really convey little information as to the real nature of the paste examined. The tests that can be made by the torsion instrument are limited in range, and it can only be used to advantage when the starch has a certain approximate degree of fluidity and cannot be relied upon when the starch paste is either too thick or too thin for its most satisfactory operation. This necessitates changing the quantity of starch used when these limits are passed.

The results of tests by these two methods are not parallel. No table can be prepared shewing how the reading by one method can be transposed into the reading by the other.

The exact conditions by which the best results can be obtained have been the subject of much laboratory work and formed part of Mr. Duryea's "Special Methods."

Mr. Duryea now claims as I have said that any starch which has been in any degree modified or made thinner boiling than crude green or mill starch, is a modified starch within his patent. He defines this modification as a change in the substance of the starch which takes place by hydrolysis and leaves the granule still the same so far as the eye or microscope can determine. This change takes place by some re-arrangement in the solution aggregate of the molecules forming the isomeric series known as the starch. Some of these carbohydrates in this incipient hydrolysis become more or less hydrated and are rendered soluble, and the whole substance is so changed as to give a less viscous paste while the general character of the mass still remains unchanged. This may be merely clouding thought by words, as little or nothing is yet known as to what does take place. There is no doubt some change, and this change may well be denominated as "modification," and instruments of precision in skilled hands may ascertain that one starch is thinner boiling than the other, but I am satisfied that this is not the sense in which the term was used in these patents. I cannot undertake to define with accuracy the degree of modification necessary to make a starch thin-boiling as distinguished from thick-boiling. No line can be drawn between dawn and daylight—but I am satisfied upon the evidence that what was meant in these patents was a degree of fluidity known to the trade as thin-boiling in the year 1901, i.e., a fluidity of from 40-80 or more, according to the pipette method. This excludes all starches having only a slight degree of fluidity (say 2-20) and leaves a region of uncertainty (say from 20-40) fortunately of no importance in this litigation.

Then there arise the questions of anticipation and infringement. The process in use in the defendant's glucose mill at the present time is that adopted after the attempt to use modified starch in June and consists of heating the starch without acid, and then re-running this heat-treated starch.

So that there might be no room for dispute as to the exact nature of the starch used and the effect of heat treatment certain experiments were made by D. Rutteau and the result was embodied in his report part I. This shewed that this starch had a fluidity of about 2° (pipette) and that its

viscosity was not changed from the viscosity of C. G. S. by the process to which it was subjected. There was not as the result of these tests any modification. The same tests gave a fluidity of 47-8 for Diamond D., and of 46-7 to the Huron Milling thin boiling starch, and a little over 2 to the H. M. Company thick boiling starch.

Mr. Duryea's results upon samples given him by Dr. Ruttan differing from these and the pipette method being the subject of some criticism further samples were taken and examinations and tests were made by Mr. Duryea and by D. Kaufman in Dr. Ruttan's laboratory and the results are shewn in Part III. of Dr. Ruttan's report.

This shews the accuracy of the first report so far as the pipette methods are concerned and also shews that the Torsion Viscosimeter can detect variations in viscosity in the thickened starches that the pipette could not discover.

As the larger figures indicate viscosity and not fluidity and as the scale of measurement is very much more sensitive some care is necessary to exactly appreciate the results. The figures of Dr. K. and Mr. D., are not identical, but are substantially the same, and they all shew a measurable decrease in the viscosity of the starch as the result of the heat treatment—the C. G. starch at from 55-67 (on Mr. D.'s figures) falling to 42-33, as the result of the heat treatment and slightly rising as the result of re-running (i.e., from 33, 92-37, 57). Table three shews the degree of conversion to be much less than conversion under the "minimum conditions" described in the Duryea patent.

I have come to the conclusion that the heat treatment is radically and essentially different from the modification intended to be the subject of Mr. Duryea's patent.

I think that the whole situation was not understood at the time of the patent. The defects in the glucose arose from the failure to eliminate impurities sufficiently before conversion. The conversion had two effects upon the proteins present: it made them less soluble, and it made them more difficult to remove by reason of the admixture with the glucose in solution. When Mr. Duryea found that he obtained a better glucose from modified starch he jumped at the conclusion that the modification and incidentally the more nearly simultaneous conversion brought about this result. In this he was, I think, in error, the improvement was caused by the purification, which was a mere incident of the

modification and not by the modification itself. When Mr. Benson ran the starch through the plant without modification (save the small degree of modification incidental to the heat process and re-running), he, quite unwittingly, demonstrated that a better glucose could be manufactured in that way. This was better because by the heating and re-running those impurities were made soluble and were removed at this early stage by the process when their removal could more readily and cheaply take place.

The essential difference in the two processes is that in the one the purification is a mere accident and is incidental to the modification—in the other modification to a very slight degree is a mere accident and incident of the purification. The purification is sought and the modification is not desired and is of such an exceedingly slight degree as to be quite immaterial.

I have thus come to the conclusion that there is no infringement, and I would so find even if I had come to the conclusion that the patent covered any degree of modification—because the processes are essentially different. The starch used by defendant is not in any aspect of the case a “purified thin-boiling or modified starch” it is essentially a “purified starch.”

I must now ascertain the rights of the parties upon the agreement and its oral supplement.

Both parties agree that what was done with reference to the glucose annex was under the oral agreement.

Section III was not regarded as adequate.

I am not able to accept as entirely accurate the statement of either party. I think each seeks to read into the agreement his inferences and to carry back and import into his recollection his impression of what he would have stipulated for had the matter which is occasioning the difficulty been present to his mind when making the bargain. I do not mean that this is being done consciously. It is one of the weaknesses incident to all memory, and the process is one which is quite unconscious. Speaking generally, I think, both witnesses endeavoured to tell the truth, as they recollected the transaction, and my great regret is that they did not make a written memorandum of their bargain at the time. I fear that there may be some ground for thinking the parties were not *ad idem*, but as this would under the circumstances be a disastrous finding I shall endeavour to spell out a bargain from the evidence.

There undoubtedly was a bargain that the new annex should be erected at the joint expense under the supervision of Duryea.

I do not think there was any bargain made such as claimed by Duryea that each was to have an equal interest in the building.

If the process was a success then Benson was to refund Duryea his share of the cost. Failure was not contemplated and there was no agreement as to what was to be then done. The building was on Benson's land and I think that as he desires to retain it he should pay its fair value to Duryea for his share. This may not be in one aspect the right way to get at the result. It may be that the right way would be to attempt to sell the material in this building but this would involve a large loss, and Duryea cannot complain if Benson is charged with the value, and as Mr. Benson has in one sense converted it to his own use he cannot complain. No doubt there was much expense in the erection of this building which is of no value to Mr. Benson in view of his failure to use the process in question, and bearing this in mind I fix \$3,500 as the price to be now charged to him, and it will be declared that he is the owner of the whole. I do not think it was intended that Duryea should have no interest in the material which entered into the building if the process was a failure. He would have a half interest in any salvage.

I find that the process in question was not demonstrated to be and was not commercially advantageous over that in use by the company. The waste in the re-running of the modified starch was such as to prevent its commercial success.

The next matter to be considered is Duryea's right to a confidential assistant. I find that this formed no part of the oral agreement. I think that Duryea believed that he would have the right to an assistant but this mental position arose not from any bargain made but rather from the impression that the provisions of the old agreement would be carried over into the new and that the oral agreement was really an extension of the old. In one sense it was, but in another sense it went far beyond the old. This large expenditure was something quite above and beyond anything contemplated under the old.

If in this I accept Benson's evidence in preference to Duryea's it must be borne in mind that his condition was

such that his memory may well be supposed to be inaccurate. I much prefer to base my preference on this than to suggest that he is intentionally inaccurate in his evidence. In fact, I desire to state my conviction that he believes most thoroughly in his story. Mr. Benson, on the other hand, impressed me as a very candid and careful witness and I was satisfied that he had this point in his mind and did not and would not agree to an outside assistant even if this had been demanded by Duryea.

Much was made by Duryea of the reasonableness of his having an assistant; this is not the question, but on this branch of the case Kaufman and DeCurcoler, both very competent chemists, men of greater experience and ability, in my judgment, than Duhaut, were at his service, and at this time when all was harmonious and success appeared to be within reach and the manufacture was upon this large scale was or appeared to be of such great moment to Duryea in his negotiations with the N. Y. Company, I cannot think that he would have made this a *sine qua non* or that it then appeared to have the same importance that it subsequently assumed when the parties became at arms' length. When I say "all was harmonious" I do not mean that differences had not existed in the past and that there was not even then mutual distrust, but each had made up his mind to the fact that in his own interest they should, notwithstanding this, work together.

From this it follows that the failure to have the demonstration was occasioned by Duryea—and he cannot now complain.

During the two days in which the defendants demonstrated they did use Duryea's process—they did infringe—(assuming the patent was valid) but they were justified in making the experiment by reason of Duryea's failure.

In any event there was no damage resulting from the temporary use of the process and under the circumstances there was not anything in what was then done which would in any way justify this action.

Coming then to Maltose.

The correspondence and evidence leave this matter in an unsatisfactory position. Under the agreement the modified starch processes were to be first taken up; then the starch syrups were to be developed. There was much experimental work done. As already pointed out, the improved glucose and proposed maltose were in a sense al-

ternative modes in which it was hoped to meet the situation occasioned by the pure food law. In the course of the experimentation the improvement of glucose loomed larger than the maltose and secured the greater attention.

Having regard to the nature of the agreement I am inclined to think that until a late stage the parties cannot complain. They were working on under this agreement by which each was making something and each was looking to the future for the reward.

But in the end I think Duryea quite failed to give any satisfactory demonstration on a commercial scale of the supposed success of the result of his experiments.

The original agreement terminated on 31st December, 1908, and whatever may have been the intention of the parties this agreement contemplated completion of the investigation and the determination of the company to acquire Mr. Duryea's rights with respect to the syrup processes before that date. Both parties agree that this was dealt with in some way by the oral agreement.

Duryea states this oral agreement upon this point as an extension of the company's option under the original agreement for six months, during which additional samples were to be submitted and if the company then elected to manufacture they could do so paying a royalty of 3 cents per hundred pounds.

Mr. Benson's statement leaves the matter at very loose ends. He says the commercial exploitation of maltose was to be left over until after Mr. Duryea had renewed his contract with the Corn Products Association, as he then contemplated, and then it would be taken up with the result of the experiments at the Corn Products Company as a guide.

The Corn Products agreement never was made and there never has been any adequate demonstration of the commercial value of maltose and on either version of the oral agreement the company has not now any right in Maltose. I cannot see my way clear to award any damages for Duryea's default in view of all the circumstances, nor have I any power to order him to carry on any experiments or to make any demonstrations of his processes. From what appeared at the trial so far as the demonstration had been made, Mr. Benson was not desirous of acquiring any rights in the maltose patent.

I think it should be declared that in the events that have happened the defendant company has not now any interest in the maltose patents or processes.

The question of the royalty payable may now conveniently be dealt with.

Under the agreement sec. I, clause 1, the plant to be erected was to be capable of an annual output of 500,000 modified starch.

Under sec. VII., clause 1, the agreement ends 31st December, 1908. Under clause 3, Duryea has a salary of \$2,000 per annum, and a royalty of 5 cents per hundred pounds on modified starch in excess of 500,000 per annum.

Under sec. VIII., on the expiry of the agreement a conveyance of the patents shall be made with the same covenants, conditions and rights reserved or mentioned in section 3, clause 6.

The company is to have the right to license to other manufacturers. Sec. III. clause 6, deals with the rights with respect to starch syrups and does not touch the royalty on modified starch.

I cannot find any agreement to pay royalty on modified starch save that found in sec. 7, 3, giving the right to manufacture 500,000 free from royalty. The reason may be as suggested by Mr. Benson that he had a market for 500,000 of modified starch prepared by the old method and it was on the excess that he was to pay. It was expected that Diamond D. would drive the "drying in" starch from the market and greatly increase the demand.

No starch has been manufactured in excess of this limit.

Then as to glucose. Clause III. 6, provides that the royalty is to be paid on "All starch syrup products manufactured" under the patents. I cannot narrow this as Mr. Benson contends. This covers all manufactured and includes glucose that goes into table syrup, &c.

Then the form of the license.

This is, I think, under clause 8, 1, to be "a grant and conveyance" or an assignment of the patents and not a mere license. No doubt the parties can settle the document in the light of the above findings and the provisions of the agreement. If not there may be a reference or I can be spoken to.

I should add that the royalty upon modified starch is payable on the "annual sales" and so would not cover any

modified starch which may be used in the manufacture of glucose. The royalty would be payable on the glucose, in that case.

The company having the right to manufacture would have the right to manufacture modified starch for glucose as well as for sale.

Kaufman's position.

Kaufman was placed in a very unfortunate position. Duryea had bound himself to disclose to the company all his knowledge, skill and secret processes. Kaufman was as Duryea's assistant and employee bound to respect his master's secrets. When Kaufman entered into Benson's employ it was with Duryea's approval and to some extent it was to his advantage. When the relations between Duryea and Kaufman became strained and Duryea was contending that he was not bound to give to Benson the information he had contracted to give he naturally became suspicious of his former employee.

I think Kaufman acted throughout with scrupulous honesty and did not in any way disclose any of Duryea's secret methods. He undoubtedly did use some of these methods in the manufacture of Diamond D. starch. If the use was in any way unauthorised then there was no damage because he was only doing what Benson was entitled to do and in this way he cut down the damage Duryea would have had to pay.

The agreement between Duryea and Kaufman of 1st June, 1906, provides that "the engagement is to be of a strictly confidential character." His employment is as a "personal confidential assistant."

Upon the renewal in May, 1907, it is provided that "this confidential restriction very particularly applies to all Charles B. Duryea's special technical manufacturing and testing processes whether patented or not."

No doubt one inducement to Kaufman in entering into the employment was the educational advantage he would receive by being trained by an expert chemist such as Mr. Duryea, and this provision cannot be so regarded as to prevent Kaufman from himself using the information he might acquire during his employment. He has in no way imparted this information, and unless the manufacture of Diamond D. for Mr. Benson was a breach, and I do not think it was, he has not in any way used the methods either of manufacture or testing.

On ceasing to be employed by Mr. Benson and the company Kaufman entered into a totally dissimilar employment and has in no way sought to avail himself of the information acquired.

Yet what he did was in one sense a violation of his agreement.

I have had much difficulty in making up my mind as to the proper result so far as Dr. Kaufman is concerned, and in the end have come to the conclusion that I should award an injunction. His cross-examination, p. 1176 et seq. compels me to this conclusion.

The laboratory equipment.

Save as to the maltose demonstration plant I do not think there has been any conversion; and, if there has been a technical conversion, I think there is power to relieve from payment of damages, on the goods being returned.

The defendant agreed to consider again the taking over of certain articles and will hand over the balance.

I think there was a conversion of the maltose plant and I give the plaintiff the option of taking it now or charging the defendants with \$150 as the damages for conversion of the cone filter as Mr. Duryea has taken over the other articles.

Upon the evidence I find, against the plaintiff, that there was no agreement such as he alleges to purchase the whole laboratory equipment.

When the figures are agreed upon the balance can be carried into the general account.

There remains the question of costs.

I do not think costs should be awarded against Kaufman.

Between the defendant company and the plaintiff the defendant has succeeded upon the issues of greatest importance and which have been most expensive to try. I do not think that I should impose upon the taxing officer the duty of apportioning costs.

The matter is further complicated by reason of Kaufman and his co-defendant appearing by the same solicitor.

I think I shall do what is right when I direct the plaintiff to pay to the defendant company half the total costs of the defence, exclusive of any costs which relate to Kaufman solely. An apportionment of costs in the taxing office is to be avoided as far as possible and owing to the artificial rules as to apportionment cannot be regarded as satisfactory.

In parting with this case which has been my companion so long I desire to express my appreciation of the assistance of counsel and very valuable work done by Dr. Ruttan.

Upon some of the issues I should have expressed myself more fully, but this judgment is much too long, and as no clerical assistance is given me I have to write it in my own hand, a labour certainly not of love.

SUMMARY.

Duryea receives salary	\$6,000 00
Retaining fee	1,000 00

\$7,000 00

Has received	6,296 08
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Balance ..	703 92
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Allowance for buildings	3,500 00
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Allowance on laboratory	1,322 61
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Allowance corn filter	150 00
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\$5,676 53

Less damages for failure to disclose secret	750 00
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Net balance due plaintiff \$4,926 53 on above items.

If I have not carried all the amounts into this account, or if I have overlooked anything, counsel may speak to me before the record is indorsed.

Since writing the above, the disclosure has been made, and the terms agreed upon may be embodied in the judgment.

MASTER IN CHAMBERS.

FEBRUARY 5TH, 1912.

SKILL v. LOUGHEED ET UX.

Costs — Security — Motion for — Action by Creditor in Name of Assignee for Benefit of Creditors—Creditor out of Jurisdiction—Residing at Montreal — Affidavit of Assignee — Dispute as to Domicile—Usual Practice of Court—Costs in Cause.

Motion by the defendant and Frances M. Lougheed for order for security for costs.

John Mitchell, for the defendant's motion.

Geo. Kerr, for the plaintiff, contra.

CARTWRIGHT, K.C. MASTER:—The facts of this case are unusual and are as follows:—

By an order made on 6th December, 1911, by Denton, Co.JJ., a creditor of the defendant was authorised at its own risk and expense to bring this action in the name of the assignee to set aside a conveyance of land made by the defendant to his wife. The order provided that the assignee should be indemnified by the creditor, and this has been done.

The defendant Frances M. Lougheed the wife of the insolvent now moves for security for costs. The main support of the motion, strange to say, is an affidavit from the assignee and nominal plaintiff. He had already refused to bring this action and was supported in that view by the three inspectors of the estate. His affidavit says that the assignment from Lougheed was made on 17th June, 1908, being just five months after the conveyance which is attacked in the present action. He gives no other information as to what dividend was paid or if the estate has been wound up.

He says that for some time past he has been employed as a traveller in Western Canada for the Lincoln Paper Mills, and that his "permanent place of residence is at Winnipeg, so far as a traveller can have a permanent place of residence."

At the same time this affidavit was made in Toronto, to which he says he returns occasionally, but at rare intervals, and he is not transacting any business in Ontario. He also says he has no property in Ontario and has no interest in

the litigation and is not in a position to pay and does not intend to pay any costs of same.

The affidavit in answer of the plaintiff's solicitor states the moving creditor has indemnified the plaintiff and also says that Mr. Skill is and for a long time has been a resident of this city, where his regular address is 52 Brunswick Ave., and that all mailed to that address apparently reach him in due course.

The matter comes up in rather an unsatisfactory way; and one which raises an uncomfortable suspicion that Skill is not unwilling to hamper the creditor.

Under the special facts of this case the best disposition of the motion would seem to be to direct the plaintiff to assign to the defendant the indemnity which he has from the creditor, assuming that it will give her as much protection as security according to the usual practice of the Court. Failing this it would seem right to require security to be given in the usual way as the creditor resides at Montreal.

The question can be definitely settled on the issuing of the order.

Costs as usual in the cause.

MASTER IN CHAMBERS.

FEBRUARY 5TH, 1912.

RE SOLICITOR.

Solicitor—Change—Motion by two Administrators for Delivery of Papers held by Solicitor—Right of Majority of Administrators to Choose Solicitor—Will of Majority should Prevail—Solicitors' Charges should be Paid.

Motion by two administrators of an estate for delivery of papers held by a solicitor.

H. T. Beck, for motion.

H. J. Martin, for the solicitor. contra.

CARTWRIGHT, K.C. MASTER:—The solicitor was originally retained by three administrators. Two of them have since employed another solicitor but the remaining administrator still adheres to the first choice and has forbidden the delivery of the papers and documents of the deceased to the new solicitor.

The original solicitor's costs have been paid as he admits, except the charge for publication of advertisement for creditors. This, I think, should be paid as it is a proper step and necessary for the protection of the sureties.

I have not found any authority on the question and none was cited. But it would seem on principle that the will of the majority must prevail. The solicitor will probably act on this without the formality of an order. In that case there will be no costs of this motion, leaving the matter to be dealt with when the estate is wound up and the compensation of the administrators is being settled.

MASTER IN CHAMBERS.

FEBRUARY 6TH, 1912.

COYNE v. METROPOLITAN LIFE INS. CO.

Costs—Motion for Security—Plaintiff out of Jurisdiction—Con. Rule 1198 (a)—Action on Life Insurance Policy—Money in Hands of Defendants—Amount of Security Reduced.

Michaelsen v. Miller, 13 O. W. R. 422, followed.

Motion by the defendants for security for costs under Consolidated Rule 1198 (a).

F. S. Mearns, for the motion.

H. H. Davis, for the plaintiff.

CARTWRIGHT, K.C., MASTER:—The action is on a policy for \$1,000 on the life of plaintiff's husband, who died 13 months after the issue of such policy—only \$43.65 was paid in premiums during the husband's life—the plaintiff after her husband's death left the province and went to Vancouver. It was there on the 17th October that she made her affidavit on production. So far as appears she has never returned to Ontario, and the affidavits filed in support of the motion make it reasonably certain that she does not intend to do so. These state that the plaintiff in September last sold her two houses and furniture at North Bay and told two deponents that she intended to make her home in Vancouver where her mother resided. This was also stated by a sister of the deceased husband to another deponent. These three deponents all reside at North Bay where the plaintiff's solicitor also lives. But they have not

been cross-examined, nor has any affidavit been filed in answer by the plaintiff or any one on her behalf. The only question remaining therefore is as to the proper amount of security. It may be a question whether the defendants if successful will be bound to return the premiums. This, however, cannot be decided now. I think, however, that the plaintiff is entitled to the benefit of the sum of \$43.65 previously mentioned and that an order should be made as in *Michaelsen v. Miller*, 13 O. W. R. 422. And that she be allowed to proceed with the action on paying into Court \$150 or giving a bond for \$300 in the usual time.

The costs of the motion will be in the cause.

HON. MR. JUSTICE MIDDLETON. . JANUARY 24TH, 1912.

VERNER v. CITY OF TORONTO.

Municipal Corporations—Isolation Hospital—Purchase of Land for Purposes of—Outside Municipality—Refusal of Neighbouring Municipality to Consent to Erection of the Hospital—Action by Ratepayer to Rescind Purchase—Right of Municipality to Hold the Property—"Use of the Corporation"—Right to Enquire into—Status of Plaintiff—Crown.

Plaintiff, John Verner, brought action on behalf of himself and all other ratepayers of the city of Toronto, against the municipal corporation and one Thompson, for a declaration that the defendant corporation was not legally empowered to purchase certain land in the township of York, alleged to have been purchased for the purposes of erecting thereon an isolation hospital, and to set aside the conveyance from defendant Thompson to said municipality, and to restrain the defendant municipality from expending any money on or taking any steps towards the purchase of the land or the erection thereon of the hospital.

MIDDLETON, J., *held*, the land had been purchased, title had passed and as between vendor and purchaser the transaction was completed. If the land was not purchased "for the use of the corporation" or "the public use of the municipality," then the Crown alone could object. Action dismissed with costs.

W. C. Chisholm, K.C., for the plaintiff.

H. L. Drayton, K.C., for the city of Toronto.

C. A. Moss, for the defendant Thompson.

HON. MR. JUSTICE MIDDLETON:—I am content to accept the statement in Dillon, 5th ed., par. 990. "Whether a municipal corporation, with power to purchase and hold real estate for certain purposes, has acquired and is holding such property for other purposes, is a question which can only be determined in a proceeding at the instance of the State."

The municipality has the power to purchase and hold lands for the use of the corporation, sec. 534, and has for certain purposes the further right to expropriate lands both within and outside the municipal limits.

Under sec. 104 of the Public Health Act this hospital cannot be established without the consent of the township of York. This consent was not asked at the date of the purchase and when asked has been refused, or perhaps it should be said more accurately was not given.

It is argued that this being the object of the purchase the consent should have been obtained before the land was purchased. The statute does not so provide. All that it aims at is the establishment and maintenance of the institution which the municipality may regard as objectionable. There can be no objection to the ownership of the land by another municipality.

The city council fearing that the disclosure of their plans before the site had been secured might make it impossible to purchase at all, or at a reasonable price, bought before making any application to the township. This course was prudent, but whether prudent or not, I have no right to criticise if within the power of the council, as I think it was.

The council, if they cannot obtain the consent of the township, may have to use the land for some other municipal purpose or may, if it sees fit to determine that it is not required, sell. This it is said is speculation in land, which is *ultra vires*. I do not think so. Speculation and the making of a profit out of the land by re-sale formed no part of the motive for the purchase. The purchase was made because it was deemed a good business transaction to buy the site before disclosing the municipal intentions. The municipality took the chance of obtaining the consent of the township and took the chance if the consent is finally refused, of selling without loss. I cannot find any jurisdiction in the Court to interfere with this. Nor should I do so unless I found some express prohibition.

I can find no trace of any right in the Court to rescind a sale, actually carried out, at the instance of a ratepayer.

A ratepayer has the right to prevent the expenditure of municipal funds for purposes *ultra vires* the corporation and when a loss occurs by reason of the *ultra vires* transaction he may hold the individual councillors responsible for the loss, but this does not justify an action to rescind and to compel the vendor to repay the price he has received.

This land has been purchased, the title has passed, as between the vendor and purchaser the transaction is completed. If the land was not purchased "for the use of the corporation" or "the public use of the municipality" then the Crown alone can object.

It is clear that this land was purchased for the use of the corporation. There is no room for the suggestion that any other than a municipal purpose was ever contemplated.

The purpose of the purchase was plain from the proceedings of the council—the establishment of an hospital for contagious diseases.

If in any way material, I find that there is no evidence brought home to the vendor of knowledge of the purpose of the purchase before the completion of the sale.

The action must be dismissed with costs.

HON. MR. JUSTICE CLUTE.

JANUARY 25TH, 1912.

HON. MR. JUSTICE BRITTON

FEBRUARY 6TH, 1912.

STAVERT v. CAMPBELL.

Appeal—To Privy Council—Effect of Giving Security for Costs of Appeal—Security not given as Required by Con. Rule 832 (d)—Stay of Execution—Privy Council Appeals Act, 10 Edw. VII. (Ont.) c. 24, s. 4—Effect of Repeal of R. S. O. (1897) c. 48—Re-enactment with Modification—Interpretation Act, s. 7 (48a.)

CLUTE, J., dismissed defendant's motion to set aside a writ *fi. fa.* issued against defendant. Defendant contended that he having given security for an appeal to the Privy Council it acted as a stay of proceedings.

BRITTON, J., granted leave to appeal to Divisional Court from above order.

F. Arnoldi, K.C., and F. McCarthy, for the defendant.

F. R. McKelcan, for the plaintiff.

An application by the defendant for leave to appeal from the judgment and order of MR. JUSTICE CLUTE, dismissing an application to set aside a writ of *fi. fa.* issued against the goods and chattels of defendant after the defendant had given security and perfected the same pursuant to ch. 24, secs. 3 and 4 of 10 Edw. VII. (1910).

The order allowing the sum of \$2,000 paid into Court as sufficient security on the appeal herein to His Majesty in his Privy Council was made in the Court of Appeal on the 15th November, 1911.

The defendant contended that the security given so operated under the Act cited, as a stay of proceedings. The plaintiff contended otherwise.

On the 19th December, 1911, the plaintiff's solicitors having issued a writ of *fi. fa.* against the defendant notified the plaintiff's solicitors of same, and stated that they were holding the writ in order that defendant's solicitors might move to set it aside. The defendant's solicitors moved accordingly.

HON. MR. JUSTICE CLUTE:—In this case security has been given for an appeal to the Privy Council, and it is contended that thereby execution in the original cause is stayed.

This application is made to set aside a writ of *fi. fa.* issued on behalf of the plaintiff on the ground that the issue of the writ is irregular and contrary to the statute.

The statute here referred to is 10 Edw. VII. ch. 24, sec. 4. Section 3 declares that no appeal shall be taken to His Majesty in His Privy Council until the appellant has given security as therein provided. Section 4 declares that upon the perfecting of such security, unless otherwise ordered, execution shall be stayed in the original cause. Section 5 provides that, subject to the rules made by the Judges of the Supreme Court, the practice applicable to staying executions upon appeals to the Court of Appeal shall apply to an appeal to His Majesty in His Privy Council.

Rule 832 declares that upon the perfecting of the security for an appeal to the Privy Council, execution shall be stayed in the original cause except (d) if the judgment appealed from directs the payment of money, execution shall not be stayed until the appellant has given security to the satisfaction of the Court of Appeal or a Judge thereof.

It was urged by Mr. Arnoldi that the statute overrides this rule, having been passed since the rule came into force. The statute is simply a revision of R. S. O. 1897, ch. 48, with a slight modification.

Section 3 of the Revised Statute corresponds to sec. 4 of 10 Edw. VII., except that the words "unless otherwise ordered" are not in the Revised Statutes.

I do not think that this objection can be supported. It would mean that any rule of practice would be abrogated

without reference to it where a statute was repealed and re-enacted in almost the same terms. Such a view cannot, I think, be entertained. Besides the Interpretation Act, sec. 7, sub-sec. 52, expressly provides that all rules and regulations made under an Act before the repeal thereof shall continue valid until altered or annulled.

I do not think the giving of the required security for appeal to the Privy Council had the effect of staying execution in the Court below. The motion is dismissed with costs.

Defendants moved for leave to appeal from above judgment.

F. Arnoldi, K.C., and F. McCarthy, for the defendant.
F. R. McKelcan, for the plaintiff.

HON. MR. JUSTICE BRITTON:—I am asked to grant leave to appeal from that decision and order.

The case involves a large amount of money, and is otherwise important, because of the question of law raised. The construction of the secs. 3 and 4 of the Act cited is asked. Section 4, if it stood alone, is perfectly plain and unambiguous. The words are: "Upon the perfecting of such security" (that is the security required by sec. 3, and which in this case has been given), "unless otherwise ordered, execution shall be stayed in the original cause."

Section 5 creates the difficulty, if difficulty there be. "Subject to rules to be made by the Judges of the Supreme Court, the practice applicable to staying execution upon appeals to the Court of Appeal, shall apply in an appeal to His Majesty in his Privy Council."

"The practice applicable," is subject to rules. What rules? The rules, are not in express terms referred to so that they can override or be of equal force with the statute. The rules, however, may be applicable, because the practice "shall apply" and the practice apparently is under C. R. 832—"Unless otherwise ordered," as found in sec. 4, can hardly apply to what is ordered by a rule; but may apply to some order made in the cause in Court or by a Judge. It may be argued that mere "practice" in obtaining an order authorized by a rule, cannot control the express terms of a statute.

In this case sec. 4 is not interfered with by anything "otherwise ordered," unless these words mean what rules

are to govern where rules have been made. I am not attempting to give a considered opinion upon the construction of this statute as would be necessary were the case before me as or in an appellate Court. I have a doubt and so can not satisfy myself in withholding the leave asked.

Leave to appeal granted.

Costs in the cause.

COURT OF APPEAL.

FEBRUARY 1ST, 1912.

TORONTO & NIAGARA POWER CO. v. NORTH
TORONTO.

*Injunction—Action to Restrain Municipality from Interfering with
Erection of Poles and Transmission Wires and for Damages—
Condition Precedent to Beginning Construction—Undertaking by
Company to have Method of Construction Approved by Railway
Board.*

COURT OF APPEAL allowed an appeal from judgment of BOYD, C., 20 O. W. R. 57, 24 O. L. R. 537, and dismissed plaintiffs' action, but under the circumstances without costs to either party.

An appeal by the defendants from a judgment of HON. SIR JOHN BOYD, C., after trial without a jury, 20 O. W. R. 57, 260; 24 O. L. R. 537.

The appeal to Court of Appeal was heard by HON. SIR CHAS. MOSS, C.J.O., HON. MR. JUSTICE GARROW, HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MEREDITH and HON. MR. JUSTICE MAGEE.

G. H. Watson, K.C., and T. A. Gibson, for the defendants, appellants.

D. L. McCarthy, K.C., for the plaintiffs, respondents.

HON. SIR CHAS. MOSS, C.J.O.:—The plaintiffs, an incorporated company with power to produce, sell and distribute electric and other power and energy, and for those purposes to construct, maintain and operate lines of wire, poles, tunnels, conduits and other works, and to erect poles, construct trenches and conduits, and do all other things necessary for the transmission of power,

heat or light as fully and effectually as the circumstances require; brought this action against the municipal corporation of North Toronto for an injunction to restrain that body from interfering with or preventing the plaintiffs in the erection of poles and lines of wire in and along Eglinton avenue, a highway within the corporation limits, or in the alternative—by amendment asked for at the trial,—for a declaration that they were entitled to erect their poles and wires for the transmission of electricity upon and along the public streets of the municipality without the leave or license of the defendants.

The learned Chancellor awarded the plaintiffs the latter relief subject to certain conditions as to depositing plans and books of reference, and obtaining the approval of the engineer of the Dominion Board of R.W. Comrs., thereto.

The plaintiffs were incorporated by Act of the Dominion Parliament, 2 Edw. VII. ch. 107, which was assented to on the 15th May, 1902. Section 21 of the Act declares that sec. 90—together with certain other sections—of the Railway Act, shall apply to the plaintiffs and their undertakings in so far as the said sections are not inconsistent with special Act.

The Railway Act in force at that time was the Act 51 Vict. ch. 19, which was assented to on the 22nd of May, 1888. But, between that date and the date of the Act incorporating the plaintiffs, a number of amendments to the earlier Act had been made, and among others section 90 was amended by adding thereto a new sub-section.

This enactment is contained in the first section of the Act 62-63 Vict. ch. 37, which was assented to on the 11th of August, 1899. When, therefore, in 1902, section 90 of the Railway Act was incorporated into the plaintiffs' incorporating Act, the sub-section added by the 62-63 Vict. ch. 37, formed part of the enactments which were made to apply to the plaintiffs and their undertakings in so far as they were not inconsistent with the incorporating Act.

At the trial the existence of this sub-section appears to have been overlooked, and the learned Chancellor's attention was not directed to it. We are, therefore, without the benefit of his view as to its bearing upon the rights asserted by the plaintiffs.

The language appears to render it applicable in many respects to the case in hand. To begin with, it specifies and deals with the case of companies empowered by Parlia-

ment to construct and maintain lines for the conveyance of light, heat, power or electricity, that is to say some of the very objects for which the plaintiffs were incorporated. And with regard to that subject, it enacts that "When any company has power by any Act of the Parliament of Canada to construct and maintain . . . lines for the conveyance of light, heat, power or electricity, such company may with the consent of the municipal council or other authority having jurisdiction over any highway, square or other public place, enter thereon for the purpose of exercising the said power, and as often as the company thinks proper, break up and open any highway, square or other public place, subject, however, to the following provisions." One of these provisions (f) is as follows:—"The opening up of any street, square or other public place for the erection of poles or for the carrying of wires underground, shall be subject to the direction and approval of such person as the municipal council appoints, and shall be done in such manner as the council directs; the council may also designate the places where such poles shall be erected; and such street, square or other public place shall without any unnecessary delay be restored as far as possible to its former condition by and at the expense of the company." These provisions were carried into the Railway Act 1903, and are now to be found in a somewhat modified form in section 247 of the Railway Act R. S. C. ch. 37.

If these enactments in so far as they require that a company with the powers possessed by the plaintiffs must proceed with the consent of the municipal council, and subject to the direction and approval of such person as it appoints and under its direction, are not inconsistent with the plaintiffs' incorporating Act, they are applicable to the plaintiffs and their undertaking, and if so the plaintiffs are left without support for the present action.

The plaintiffs rest the right asserted in the action upon sections 12 and 13 of the incorporating Act.

Is there anything in them reasonably inconsistent with sec. 90 of the Railway Act as it stood when it was imported into the plaintiffs' Act?

In other words can it be fairly said that having regard to the objects for which the plaintiffs were incorporated, the character of the work necessary to be done in order to carry these objects into effect and the public ownership and user of much of the property upon, along and over

which the plaintiffs' powers were to be exercised, there is any 'substantial contradiction between the provisions of sections 12 and 13 of the incorporating Act and section 90 of the Railway Act?

Sections 12 and 13 confer powers that are requisite and necessary as of course, in order to enable the plaintiffs to prosecute the enterprise for which they were incorporated.

They are empowered by sec. 12 to acquire, construct, maintain and operate works for production, and works for the conduct and supply, of electricity and other power, and by means thereof produce and transmit and furnish it to, or receive it from, others as well as to perform other acts. And section 13 says that they may erect poles, construct trenches or conduits and do all other things necessary for the transmission of power, heat or light, as fully and effectually as the circumstances of the case may require, provided the same are so constructed as not to incommode the public use of streets, highways or public places, or to impede the access to any house or other building erected in the vicinity thereof, or to interrupt the navigation of any waters, but they shall be responsible for all damage which they cause in carrying out or maintaining any of these works.

These provisions do not expressly negative the property rights of municipalities or individuals, and the stipulation as to payment of damages found in each of these two sections does not necessarily exhaust the conditions to which the plaintiffs could reasonably be required to conform.

The enactments of the subsection added to sec. 90 of the Railway Act are not in conflict with what is enacted in sections 12 and 13 of the incorporating Act. They follow naturally as directions incident to the exercise of the powers given to the plaintiffs in order to the carrying out of their enterprise. Even before the date of the plaintiffs' Act, the trend of legislation had set in the direction of, municipal control over the exercise of powers upon streets and highways by incorporated companies, and that circumstance may account for the importation of section 90 into the incorporating Act. In any case the question is one of construction of the Act as a whole; and the provisions are to be read together if they may be so read without leading to an unreasonable or absurd result.

Reading them together the meaning to be gathered seems to be that sections 12 and 13 confer powers to be

exercised in conformity with the directions of section 90 of the Railway Act in so far as they relate to the construction and maintenance of lines for the conveyance of light, heat, power and electricity upon or along highways, squares or other public places.

That being the case, the plaintiffs' case fails and the action should have been dismissed.

It follows that the appeal must be allowed and the action dismissed, but under all the circumstances there should be no costs to either party.

HON. MR. JUSTICE GARROW:—I agree.

HON. MR. JUSTICE MACLAREN:—The plaintiff company professing to act under the powers conferred upon it by the Dominion Statute of 1902, incorporating it, being 2 Edw. VII., ch. 107, was proceeding with the erection of poles for the purpose of stringing electric transmission wires along Eglinton avenue in the town of North Toronto. They were stopped by the municipal authorities, and their workmen arrested. They claim that the town authorities have nothing to say in the matter and no right to interfere with them, and brought the present action for an injunction restraining the town, and for a declaration that they have the right to erect their poles and string their wires on the streets of the town without asking leave so to do.

The works authorized by the company's Act of incorporation are declared to be for the general advantage of Canada. By sec. 12 "The company may acquire, construct, maintain and operate works for the production, sale and distribution of electricity and power, for any purpose for which such electricity or power can be used, and may construct, maintain and operate lines of wire, poles tunnels, conduits and other works in the manner and to the extent required for the corporate purposes of the company, and may conduct, store, sell and supply electricity and other power, and may with such lines of wire, poles, conduits, motors or other conductors or devices, conduct, convey, furnish or receive such electricity to or from any person at any place, through, over, along or across any public highway, bridges, viaducts, railways, water-courses, etc."

"13. The company may erect poles, construct trenches or conduits, and do all other things necessary for the trans-

mission of power, heat or light as fully and effectually as the circumstances of the case may require, provided the same are so constructed as not to incommode the public use of streets, highways, or public places, or to impede the access to any house or other building erected in the vicinity thereof, or to interrupt the navigation of any waters, but the company shall be responsible for all damage which it causes in carrying out or maintaining any of its said works."

The case was tried by the Chancellor, who held that under the sections of their charter above quoted and the authority of *Toronto v. Bell Telephone Co.*, [1905] A. C. 52, the company had the right to erect their poles and string their wires along Eglinton avenue without asking the leave of the town; but held that before doing so they should deposit a plan and book of reference as required by the Railway Act, and inasmuch as the evidence shewed that on account of the danger to the other wires on the streets of the town the company should obtain the approval of their plan by the engineer of the Dominion Railway Board. We were informed by counsel for the company that they had deposited their plan and would obtain the consent of the Railway Board engineer, although they did not admit that the board had any jurisdiction in the matter.

In my opinion the company misconceived its rights and I consider that the question at issue is governed by sec. 247 of the Dominion Railway Act, R. S. C. (1906), ch. 37, which does not appear to have been cited to the learned Chancellor. This section provides that "When any company is empowered by any Special Act of the Parliament of Canada to construct, operate and maintain lines . . . for the conveyance of light, heat, power, or electricity, the company may with the consent of the municipal council or other authority having jurisdiction over any highway, square, or other public place, enter thereon for the purpose, exercising the said powers . . . subject, however, to the following provisions: (e) The opening up of any street, square, or other public place for the erection of poles, or for the carrying of wires under ground, shall be subject to the supervision of such person as the municipal council may appoint," etc. Sub-section 5 provides that if the company cannot obtain such consent it may apply to the Railway Board to which it shall submit a plan of the highway, square, or other public place, shewing the proposed location of such lines, wires and

poles. By sub-section 6 the board may grant the application in whole or in part, and may make such changes or impose such terms as it deems expedient. Section 21 of the company's charter provides that sec. 90 and some other sections of the Railway Act of 1888, should apply to the company and its undertakings, except in so far as the said sections are not inconsistent with the provisions of the charter. This would include the amendment to sec. 90, passed in 1899, 62-63 Vict., ch. 37, which provided that when any company was given power to construct and maintain lines for the conveyance of light, heat, power, or electricity the company might with the consent of the municipal or other authority having jurisdiction over any highway, square, or other public place enter thereon for the purpose of exercising the said power.

This amendment was referred to and relied upon by the defendants' counsel before us, and he informed us that it had not been cited to the learned Chancellor. Plaintiffs' counsel's reply to this argument was that this amendment to sec. 90 was repealed in 1903, with the rest of the Railway Act of 1888, and was no longer law.

If the defendants had to rely upon this section it would be necessary to inquire what effect the repeal of 1903 had, and whether the provisions of the amendment of 1899, were inconsistent with the powers conferred on the plaintiff company by its charter and particularly by secs. 12 and 13, specially relied upon by their counsel.

But in my opinion it is not necessary for us to look at or reply upon the amendment of 1899. The Interpretation Act, R. S. C. (1906), ch. 1, sec. 20 (b), provides that "Whenever any Act or amendment is repealed, and other provisions are substituted by way of amendment revision or consolidation . . . any reference in any unrepealed Act, or in any rule, order or regulation made thereunder to such repealed Act or enactment, shall, as regards any subsequent transaction, matter or thing, be held and construed to be a reference to the provisions of the substituted Act or enactment relating to the same subject-matter as such repealed Act or enactment."

This precisely meets the present case. When the Railway Act of 1888, was repealed on its revision and consolidation in 1903, the second part of sec. 90 of the Act of 1888 was amended and became sec. 195 of the Railway Act, 1903; and on the general revision of the statutes in 1906, this sec.

195 became sec. 247 of the Railway Act, R. S. C. ch. 37, quoted above; so that the company's charter of 1902 must now be read as if this sec. 247 had originally been embodied in and had formed a part of the company's Act of incorporation.

A reference to sec. 247 shews that it applies to any company empowered by Special Act of Parliament to construct, operate and maintain lines for the conveyance of light, heat, power, or electricity, and is not limited like the amendment of 1899, to companies incorporated after a day named.

The company had, therefore, in my opinion no right to proceed to erect their poles on Eglinton avenue, as they claimed they had the right to do, without the consent of the municipal council of North Toronto, and are subject to the supervision of such person as the said council might appoint, and if the council refused such consent the company should apply to the Railway Board, submitting a plan of the streets, squares, or other public places on which they wished to exercise their powers, and the proposed location of such lines, wires, and poles.

The appeal should be allowed and the plaintiffs' action dismissed, but without costs.

HON. MR. JUSTICE MEREDITH:—Under the plaintiffs' Act of incorporation, 2 Edw. VII., ch. 107: assented to 15th May, 1902—sec. 90 of the Railway Act—with other sections of that enactment—was made applicable to the plaintiffs, and to their undertaking, in so far as it was not inconsistent with the provisions of the Act of incorporation; and that section of the Railway Act, as it was when the plaintiffs were incorporated—62-63 Vict. ch. 37, sec. 1: assented to 11th August, 1899—and as it still is, required, and requires, the consent of the municipal council, or other authority, having jurisdiction over the highway, before such work as that in question could or can be done lawfully, as well as that the opening up of the highway should be subject to the direction and approval of such person as the municipal council should appoint, and should be done in such manner as such council should direct; which council might also "designate" where the poles should be erected.

These things are not inconsistent with the provisions of the Act of incorporation; and were quite in accord with the trend of legislation at that time in that respect, a trend which, to say the least of it, has not since weakened.

The powers of the plaintiffs in respect of the matters here in question, conferred by the Act of incorporation, apart from that part of the Railway Act engrafted upon it; are by no means as plainly expressed as they might be, but the Act certainly does not, in so many words, provide for the carrying of the plaintiffs' wires along the highway, as they please, against the will of the municipality; and reading sec. 90, of the Railway Act, into the Act of incorporation, as if it had there been set out in full, one can have no reasonable doubt that the right and power of the municipality, set out in it, were intended to be applicable to the plaintiffs' undertaking; and, that being so, this appeal must be allowed, and the action dismissed, because the acts of the plaintiffs, complained of in this action, were done in disregard of such right and power; but as, for some unaccountable reason, the provisions of sec. 90, of the Railway Act, as they were at the time of the passing of the Act of Incorporation and since have been, were not brought to the attention of the Court below, I would make no order as to costs either here or there.

—HON. MR. JUSTICE MAGEE:—The powers of conducting its lines and erecting poles along the streets of a municipality given in 1902, to the plaintiff company by its Special Act of Incorporation, 2 Edw. VII., ch. 107, in secs. 12 and 13. were practically the same as those conferred upon electric telegraph companies by the general Act relating to them, R. S. C. 1886, ch. 132, and upon various telephone companies.

In 1899 it had become frequent that railway companies would apply for and be granted in their special Acts of incorporation power to generate and dispose of electricity for light, heat, and power and to construct telegraph and telephone lines for public messages. In the session of 1899, alone such powers were given to various railway companies—see among others 62-63 Vict. ch. 50, 66, 70, 72, 77, 85, and 87. There were no sections of the general railway Act specially applying to these powers, and in some of the special Acts the particular company was given the powers of the Electric Telegraph Companies Act—e.g., in 62-63 Vict. chs. 50 and 70.

So in 1899, sec. 90 of the general Railway Act of 1888, was amended by 62-63 Vict. ch. 37, sec. 1, by adding a sub-sec. 2, which, however, was not to apply to companies in-

incorporated before that year. That new sub-sec. 2 declared: "When any company has power by any Act of the Parliament of Canada to construct and maintain lines of telegraph or telephone or lines for the conveyance of light, heat, and power, or electricity, such company may with the consent of the municipal council or other authority having jurisdiction over any highway, square, or other public place enter thereon for the purpose of exercising the said power, and as often as the company thinks proper, may break up and open any highway, square, or other public place, subject, however, to the following provisions." The provisions (a) to (k) which follow are all restrictions upon the company, and one of them (f) declares that "the opening up of any street . . . for the erection of poles . . . shall be subject to the direction and approval of such person "as the municipal council appoints and shall be done in such "manner as the council directs; the council may also designate the places where such poles shall be erected."

That this amendment of sec. 90 was intended to embody the general policy to be adopted for the future with regard to all such railway companies, can I think hardly be doubted expressly limited as it was to companies incorporated in that session or thereafter—and it could hardly be argued with success that those companies which in that session had inserted in their special Acts a reference to the Electric Telegraph Companies Act, could thereby override the new amendment and dispense with the consent of the municipal council.

I have said it was the policy for all such railway companies, for I think it was limited to them. Although it refers to "any company," it was only an amendment of a section in the Railway Act of 1888, and in that Act company means railway company. This is the more obvious when we turn to the Railway Act of 1903, which consolidated the various statutes as to railways. There in the corresponding sec. 195, the words are "the company," which again mean railway company. In the present Railway Act, R. S. C. 1906, ch. 37, sec. 247, the expression "any company," is again used, but the definition of company is the same, and in the following sec. 248, special reference is made to other telephone companies and requiring municipal consent.

Then this company was incorporated in 1902, for equally dangerous, if equally useful purposes, and Parliament declared that sec. 90 of the Railway Act and 62 other sections

of that Act should apply to it so far as not inconsistent with the Special Act. As sec. 90 was only one of 63 sections thus incorporated with the latter Act, there cannot be said to be any implication that Parliament considered that particular section to be inconsistent with it. Section 90 was the one of the 63 sections, which specially related to the powers of a company as to the construction of its line—and the sub-section added in 1899 was specially applicable to such works as those of this company. As the company was not a railway it was necessary in the Special Act to declare that for its purpose in those 63 sections of the Railway Act the word “company” should be deemed to mean this company.

Considering the objects of the company there was certainly no reason why it should in relation to highways be given greater powers than railway companies with similar powers. There was every reason why it should not. It stands practically in the same position as regards legislation as the companies I have referred to which were given the powers of the Electric Railway Act. Can it then be said to be inconsistent with its power to construct its lines along the highways that it should comply with sec. 90, and obtain the consent of the municipality? Section 12 of its Special Act gives power to enter upon and take private property, but it could hardly be contended that it would be inconsistent with that to require it to take the proper regular proceedings under the provisions of the Railway Act made applicable. So when it is given power to put its lines and poles upon the highway there seems no reason to consider it should do so otherwise than as prescribed by the very section (90), which is made applicable to it, and which requires the municipality's consent and approval and direction, and I do not see any inconsistency in the two enactments, although one qualifies the other especially as the Special Act itself in sec. 13, shews that the public use of the streets and the private access to property were not to be incommoded. The necessity for approval of the authority which is the statutory guardian of such streets and responsible for their repair is quite consistent with the right to put the poles and wires along them. It is noticeable that in this singular Special Act, which places no restriction on the locality of the company's operations in Canada, and only indicates them in its title, the objects of the company are nowhere stated. but only as its powers are in various sections declared. There

is every reason to construe these sections then as much statements of the objects of the company as specifications of the way in which those objects are to be carried out, and therefore still less "inconsistency" in holding the general policy of sec. 90 to be applicable. I am, therefore, of opinion that the consent of the municipality was necessary under the amendment of 1899, which was not brought to the attention of the learned Chancellor.

This necessity has not been dispensed by subsequent legislation. In 1903 the Railway Act was recast and consolidated in 3 Edw. VII., ch. 85, which came into force by Royal Proclamation. It repealed the Act of 1888 and the amending Act of 1899, but it does not seem to have changed the situation. In sec. 195 it re-enacted the provisions of the 1899 amendment to sub-sec. 90, and this time without restricting it to companies incorporated in or after 1899, thus emphasizing the general policy—but in sec. 5 it declared that unless otherwise expressly declared "Where the provisions of this Act and of any Special Act relate to the same subject-matter the provisions of the Special Act shall in so far as is necessary to give effect to such Special Act be taken to override the provisions of this Act," and that if in any Special Act passed theretofore the application of any provision of the railway was excepted, extended, limited, or qualified the corresponding provision of this Act shall be taken to be excepted, extended, limited, or qualified in like manner. It may be questioned whether those secs. 3 and 4 relate to any companies other than such as the Act has in view that is "railway" companies, and whether it would apply to companies for a different purpose as to which Parliament had for the sake of brevity referred to the Railway Act. But whether that be so or not, it is evident that the powers of this company were not curtailed thereby.

The same may be said of the Revised Act of 1906 (R. S. C., 1906, ch. 37, secs. 247, 3 and 4.)

In all these Railway Acts of 1888, 1899, 1903, and 1906, the word "company" refers, as I have said, to a railway company (sec. 248 expressly refers to a telephone company). It is only by virtue of this company's Special Act, sec. 21, that the word "company" in the specified sections can be taken to mean this company.

Then what was the effect of the repeal in 1903, of the Acts of 1888 and 1899? The Interpretation Act then in

force R. S. C. 1886, ch. 1, sec. 7 in clause 51, enacted that whenever any Act is repealed and other provisions are substituted by way of amendment revision or consolidation, any reference in any unrepealed Act, to such repealed Act or enactment shall as regards any subsequent transaction, matter or thing be held and construed to be a reference to the provisions of the substituted Act relating to the same subject-matter. The same provision is to be found in the present Interpretation Act, R. S. C. 1906, ch. 1, sec. 20 (b). Thus this company's Special Act is to be read with sec. 247 of the present Railway Act, R. S. C. 1906, ch. 37, which governs, and is not in my opinion inconsistent with it.

I would, therefore, agree in allowing the appeal.

DIVISIONAL COURT

FEBRUARY 1ST, 1912.

McEACHEN v. GRAND TRUNK R.W. CO.

*Negligence — Railway — Servant Killed while Walking on Tracks—
Warning — Findings of Jury — Evidence — Contributory
Negligence—Ultimate Negligence.*

Plaintiff, Mary McEachen, widow of Allan McEachen, brought action on behalf of herself and her two children, to recover damages for the death of her husband, who was run over by defendants' train, while he was engaged in work for the defendants, owing, as she alleged, to their negligence.

MEREDITH, C.J.C.P., at trial, dismissed the action without costs, upon the answers of the jury to questions submitted to them.

DIVISIONAL COURT dismissed plaintiff's appeal with costs if demanded, holding that it was plain that the unfortunate man's own want of the most ordinary care contributed to the accident.

An appeal by the plaintiff from a judgment of HON. SIR WM. MEREDITH, C J C.P., at trial, dismissing the action without costs.

The appeal to Divisional Court was heard by HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B., HON. MR. JUSTICE BRITTON and HON. MR. JUSTICE RIDDELL.

J. G. O'Donoghue, for the plaintiff, appellant.

D. L. McCarthy, K.C., for the defendants, respondents.

HON. MR. JUSTICE BRITTON:—This is an action by the plaintiff, who is the widow of the deceased Allen McEachen,

who was in the employ of the defendants, as a carpenter and rightfully in such employment upon and about defendants' premises. The action is by the widow for herself and on behalf of the infant children of deceased—for damages, the plaintiff alleging that the death was caused by negligence of the defendants. The deceased was run over by a train of defendants and killed, on the 21st December, 1910. The negligence alleged by the plaintiff is everything mentioned in sec. 3, sub-secs. 1 to 5 inclusive, of the Workmen's Compensation for Injuries Act. The case came on for trial at Toronto, and was tried by Chief Justice Sir Wm. Meredith and a jury on the 2nd October, 1911. The learned trial Judge submitted questions to the jury, and the jury upon these, found that the defendants were guilty of negligence, which occasioned the death of McEachen. The negligence found by the jury was "that the cars should not" (have been cut) "be cut loose without a man being in charge of the brake." This is not the negligence complained of, and in view of all the evidence such an answer by the jury is hardly warranted. That, however, is not material in view of the next question and answer.

Question 4. "Was the accident caused wholly or partly by the negligence of the deceased?" To which the answer was "partly." That, of course, means that the deceased by his own negligence—in part contributed to the accident which caused his death. And that answer, if founded upon evidence, bars plaintiff's right to recover unless recovery can be had by reason of question No. 6, and the answer thereto.

Q. 6. "Could the trainmen after they became aware that the deceased was coming to the switching track by the exercise of reasonable care have prevented the accident?" A. "Yes."

I entirely agree with the contention of counsel for plaintiffs that if the evidence disclosed that the trainmen after they saw the danger of deceased—could reasonably have done anything to prevent the accident—the defendants might be responsible for the trainmen's negligence notwithstanding the finding in answer to the second question.

This question 6 has to do with ultimate negligence—it pre-supposes that there may have been negligence on the part of deceased—that by reason of the deceased's own negligence in part, he was in danger then after the trainmen knew of such danger, could they have done anything to prevent the

accident? If there was any evidence that would permit of the finding as the jury have found in answer to 6, then that finding should not be disturbed, but in my opinion, there is no evidence to warrant any such finding, the evidence is all the other way. There can be no presumption in favour of deceased. All those who know do not speak of there being anything to shew negligence or from which negligence can be imputed after the deceased was in danger—or known to be in immediate proximity to, and actually stepping into danger.

Ultimate negligence—or negligence to create such liability as is implied in question 6, cannot be as to the car equipment—with brakes, bell, whistle or anything of that kind. All these things have reference to negligence negatived by the finding in answer to the 2nd question.

Unable as I am to discover any evidence which would permit the answer of the jury to the 6th question, to stand as creating a liability on the part of defendants in this action, my conclusion is that the judgment should stand and this motion be dismissed—with costs if exacted.

Nothing would be gained by a new trial even if we should be of opinion for any reason that the plaintiffs should have one. No doubt all the evidence possible was forthcoming and the case was fully argued.

HON. MR. JUSTICE RIDDELL:—The deceased Allen McEachen, a foreman carpenter on the Grand Trunk Railway was killed December 21st, 1910, on their line. At the place of the accident, a little west of Windermere avenue, there were north of the elevated track, four separate lines running between the Bolt Works and the elevated track. Numbering from the south track 3, held immediately before the accident, a switching train, seven cars, a caboose and engine, making a train of some 300 feet long. The engine was facing westward "nosing" the train which was, therefore, west of the engine; and at the west end of the train were the caboose and a box car which were to be sent up the straight track No. 3, the remainder of the train then to be switched around west of the Bolt Works.

This operation seems to have begun with the westerly car about 50 feet east of Windermere avenue. The yard helper Rowan got up on the foremost car, the box car west

of the caboose, and saw the deceased walking "right in the centre between the two tracks on the eight feet," between tracks Nos. 2 and 3. The bell was continuously ringing, but no whistle was blown. There was nothing to indicate any danger to the deceased, as he would be well out of the way of the train. A train was coming from the west toward the locus on track No. 1.

When the box car on the track 3 was about a car length east of the deceased, Rowan saw him step to the north over upon track 3—Rowan "shouted and gave a frantic stop signal" to the engineer—the hand brakes on the box car were on the east end and Rowan did not have time to apply them—he was taken up with trying to warn the deceased. The cars were going west about 4 or 5 miles per hour and the yard helper could not have stopped it in a car length as he thinks. It seems probable that the train passing east on track No. 1 prevented the deceased hearing the bell, the noise of the west going train or the shouts of the yard helper. He did not turn round to see if any train was approaching. The engineer applied the brakes as soon as he got the signal, but the cars did not stop in time and the box car and short caboose ran over and killed the unfortunate man. The engineer called by the plaintiff says he could not have stopped any quicker.

At the close of the plaintiff's case her counsel mentioned the several grounds of negligence upon which he relied and the learned trial Judge, the Chief Justice of the Common Pleas, charged the jury with great care upon the various allegations of negligence, (1) that Rowan should have warned the deceased; (2) "As to the whistle there is no dispute . . . on the facts and if you attribute the happening of the accident to the omission to whistle you will say so, and I will deal with the question of law or the Court will deal with that afterwards;" (3) "Then it is said that the train as not stopped in time;" (4) "It is said there ought to have been a brake at the rear of the car" (this is explained later as being the west end of the box car; (5) "That Rowan ought to have rushed immediately to the rear of the car and have applied the rear brake" (i.e., in this case as explained later, the east end of the box car).

The charge proceeds to deal with contributory negligence—and questions are submitted. Counsel upon this appeal complains that the learned Judge was not right in his law

when addressing the jury—and if we take out one sentence from all the rest a plausible argument may be framed that this contention is correct—but the jury were not allowed to find a general verdict or to deal with the law at all—and any such error (if such there were, and I think there was not taking the charge as a whole), could not affect the answers of the jury or the result.

The following questions were submitted (I subjoin the answers to save repetition).

1. Were the defendants guilty of negligence in operating the shunting train? A. Ten for negligence, two against.

2. If so, what was the negligence? A. That the cars should not be cut loose without a man being in charge of the brake. Ten for, two against.

3. If there was negligence was the accident to the deceased caused by such negligence? A. Ten says yes, two says no.

4. Or was the accident caused wholly or partly by the negligence of the deceased? A. Eleven say partly, one says wholly.

5. Damages: To the widow \$1,000; To Ronald, \$750; to Catherine, \$750.

Thereupon counsel for the plaintiff asked that the jury should be told that they were at liberty to say on all the circumstances there was negligence without mentioning any specific negligence—this the Chief Justice rightly refused—counsel claimed then that “kicking off the cars in the way it was done was negligence,” and His Lordship left that to the jury.

The jury then retired; and counsel for the plaintiff addressed the Court:—

Mr. O'Donoghue: I suggest to your Lordship that you should leave this question to the jury also; could the defendants, notwithstanding the negligence, if any, of deceased, have avoided the accident?

His Lordship: That is not the question you handed up to me. I will ask them, if you choose, whether Rowan, after he became aware of the position of this man—that he was crossing the track—could, by the exercise of reasonable care, have prevented the accident happening.

Mr. O'Donoghue: I am submitting the general question.

His Lordship: Well, I will not put the general question.

Mr. O'Donoghue: I was just getting it on the notes.

His Lordship: I will leave to the jury the question—although I think there is no evidence of it; the evidence is all against you on it—whether, after the trainmen—or it would really be this man Rowan—became aware that this man was going to cross the track, he could, by the exercise of reasonable care, have prevented the accident.

Mr. O'Donoghue: I have no objection to that, but I also want to ask this one.

His Lordship: Well, I will not do that.

Mr. O'Donoghue: I only want to get it on the notes. The question I was asking was, could defendants, notwithstanding the negligence, if any, of deceased, have avoided the accident by the exercise of reasonable care?

* * * * *

His Lordship: Call the jury back.

The jury are here accordingly brought back into Court, and the following takes place:—

His Lordship: Counsel for the plaintiff desires me to ask another question. I am going to ask it, although it is involved in the questions you have already been asked. This is what I will ask you: Could the trainmen, after they became aware that the deceased was crossing the switching track, by the exercise of reasonable care, have prevented the accident?

Mr. O'Donoghue: Your Lordship will understand that is not the question I submit.

His Lordship: I understand it perfectly. It is a better question than yours. I will not submit it the other way, if you want it I will ask, "Could Rowan?"

The question following was then added and given to the jury (I subjoin also their answer).

6. Could the trainmen, after they became aware that the deceased was coming to the switching track, by the exercise of reasonable care, have prevented the accident?
A. Yes. Ten for, two against.

Upon this the learned Chief Justice said: "I think I must enter judgment for the defendants on these findings. The jury, in their answer to the second question, place the negligence of the defendants upon this ground: that the car should not have been cut loose without a man being in charge of the brake. The effect of that finding, according to the cases, is to negative all the other grounds of negligence that were put forward by the plaintiff, therefore to

negative the failure to whistle as not having been the efficient cause of the accident, and all the other grounds of negligence upon which Mr. O'Donoghue relied. It was not even argued by counsel that there was negligence in not having a man in charge of the brake before the car was cut loose. There is no evidence to support either view—that it was negligence or that it would not have been negligence to have a man in charge of the brake—and what evidence there is is altogether against the idea that if there had been a man in charge of the brake it would have had any effect whatever. If the signal to the engine-driver could not have prevented it through his stopping by means of his brake it follows as a matter of course that the other man could not have stopped the car—it would have taken longer probably. Then I think also that there was no evidence whatever to support the answer to the sixth question. There was nothing that could have been done, upon the evidence—with the appliances that were there at all events—to have stopped the car in time to have prevented the accident after it was seen the man was stepping on to this track upon which the shunting train was.”

Counsel upon the appeal before us urged that by reason of the form of the 6th question, the jury might have thought that they were precluded from finding negligence of the defendants before the deceased started for the track No. 3—it is plain that this is not so—the jury have found negligence of the defendants before this point of time and it is equally clear that the trial Judge is right in confining all question of “ultimate” negligence to the time from which the defendants or their servants could have anticipated any danger—any negligence before that time must be negligence covered by questions Nos. 1 and 2.

It is also plain that nothing appears in the evidence justifying the answer of the jury to question No. 6, or indeed to question No. 2. But in any event the answer to question 2 precludes a finding of any other negligence than that specifically found; it is not necessary to give authority for such a thoroughly established proposition. The jury then have found against the plaintiff upon whether the absence of the whistling, etc., caused the accident; and even were the statutory duty to whistle to be held to exist under the circumstances the jury have found it immaterial that such duty (if any) was not fulfilled.

It must be plain that the unfortunate man's own want of the most ordinary care contributed to the accident.

I think the motion must be refused and with costs if asked.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—I agree that the appeal should be dismissed with costs.

COURT OF APPEAL.

FEBRUARY 1ST, 1912.

COUNTY OF HALDIMAND v. BELL TELEPHONE CO.

Municipal Corporations — Right of Telephone Company to Erect Poles on Bridge — Consent not Given by Municipality — Injunction.

COURT OF APPEAL allowed plaintiffs' appeal from a judgment of Latchford, J., 19 O. W. R. 335, and entered judgment for the plaintiffs with costs, with a stay of the injunction for three months.

An appeal by the county of Haldimand from a judgment of HON. MR. JUSTICE LATCHFORD, 19 O. W. R. 335, dismissing their action for an order compelling the Bell Telephone Co. to remove their poles from the piers of the bridge crossing the Grand river at the village of Cayuga.

The appeal to Court of Appeal was heard by HON. SIR CHAS. MOSS, C.J.O., HON. MR. JUSTICE GARROW, HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MEREDITH and HON. MR. JUSTICE MAGEE.

T. G. Meredith, K.C., for the plaintiffs, appellants.

G. Lynch-Staunton, K.C., for the defendants, respondents.

HON. MR. JUSTICE MACLAREN:—In May, 1887, the county council gave permission to the company to fasten a small scantling fixture to the rafters of the bridge projecting about three feet from the side upon which to put its wires. The wires remained there until 1907 when the company removed them to the other side of the bridge stringing them upon poles inserted in the stone piers of the bridge. There were some negotiations between the parties as to allowing the poles to remain, but no agreement was come to.

By its defence the company claimed that under its charter 43 Vict. ch. 67 (Dom.), amended by 45 Vict. ch. 95, it had a right to do what had been done.

The trial Judge held that under sec. 248 of the Railway Act, R. S. C. ch. 37, the company could not do what had been done without the consent of the municipality, or failing such consent without the leave of the Board of Railway Commissioners. He found that the plaintiffs had suffered no actual damage, and until they did so, he held that their only remedy was to apply to the Railway Commissioners to have the poles removed, and dismissed the action with costs.

On behalf of the company it was argued before us that as it was given power under sec. 3 of 43 Vict. ch. 67 to "construct, erect and maintain its line or lines of telephone along the sides of and across or under any public highways, streets, bridges, water-courses or other such public places, or across or under any navigable waters," and as bridges are not mentioned in sec. 248 of the Railway Act, the company had the same rights with respect to this bridge as it was held by the Privy Council to have with respect to the streets of Toronto in *Toronto v. Bell Telephone Co.*, [1905] A. C. 52.

Sub-section 2 of sec. 248 of the Railway Act provides that except as therein provided a telephone company shall not "construct, maintain or operate its lines of telephone upon, along, across or under any highway, square or other public place within the limits of any city, town or village incorporated or otherwise, without the consent of the municipality." Sub-section 3 provides that if the company cannot obtain such consent on terms acceptable to it, it may apply to the Board of Railway Commissioners.

The trial Judge was of opinion that the omission of the word "bridge" in sub-sec. 2, had not the effect the company claimed, and I think he was clearly right. The bridge in question is a part of the highway, and is covered by the language of the sub-section.

The provisions of these two sub-sections do not apply to long distance or trunk lines. The location of these is by sub-secs. 4 and 5 subject to the direction of the municipality, or its officer, unless they, after a week's notice in writing, shall have omitted to prescribe such location and make such direction.

It is admitted that some of the lines in question are local, and some are long distance or trunk lines. With regard to the former the company had no right to proceed without the consent of the plaintiffs or of the Board. With regard to the latter they should have given the week's notice or have received the direction of the municipality or its officer. With respect to both classes of lines, they were mere trespassers, and I can find nothing in the law requiring the plaintiffs to apply to the Board ousting the jurisdiction of the Courts.

In my opinion the appeal should be allowed, and the order asked for by the plaintiffs should be granted, unless the parties can within a reasonable time either make a satisfactory agreement, or failing this the defendants take the steps prescribed by the Railway Act.

HON. MR. JUSTICE GARROW, and HON. MR. JUSTICE MAGEE, agreed.

HON. MR. JUSTICE MEREDITH:—If the acts of the defendants, which are complained of, were unauthorised in law, they are continuing trespassers to land, and ought to be enjoined from all further continuance of such trespass, the result of which would be the removal of their poles and lines from the bridge in question and a restoration of it to the condition in which it would be now but for such trespasses; and this was not at all disputed upon the argument here.

The only substantial questions involved in the case are, therefore, whether the defendants had a legal right to do the things which they have done; and, if not, whether the plaintiffs are seeking a remedy in the proper forum.

That there was no leave or license from the plaintiffs to do that which has been done is very plain. The leave which had been given was to do something of a very different character and even that leave was given, and indeed asked for, only subject to the right of the plaintiffs to withdraw it whenever they saw fit. Subsequent negotiations never reached the stage of a completed agreement, or of leave or license.

The right upon which the defendants rely is the statutory power conferred upon them in their Act of incorporation; but that right was modified by an amendment to that Act; and subsequently both were superceded in so far as the

question in this case is concerned, by the provisions of sec. 248 of the Railway Act, R. S. C. 1906, ch. 43, under which no such work as that in question can be done without the consent of the municipality unless the line is a long distance or trunk line, and in regard to such lines the location of the line upon the highway is made subject to the direction and supervision of the municipality, or of such officer as it may appoint, unless this is not done for a week after notice requiring it.

Some of the lines in question are not long distance or trunk lines, and, therefore, the defendants had no power to erect them because no consent of the municipality to it was ever given; and so too in regard to the lines which are long distance lines, because they were erected without giving the week's notice, and without the direction and supervision of the municipality or of an officer appointed by it.

It was, however, contended that this Act did not apply because bridges are not expressly mentioned in it; but the bridge in question is but part of the highway, and is a public place, and the Act expressly applies to "any highway, square or public place in any city, town or village incorporated or otherwise": and in addition to that, the interpretation clauses of the Act provide that the word "'highway,' includes any public road, street, land or other public way or communication." The fact that the defendants' Act of incorporation includes the word bridges with highways and streets can hardly be considered seriously a reason for excluding all bridges from the effect of the Railway Act.

Another contention was that the work complained of was nothing more than a renewal or reconstruction of lines before constructed and so was within the provisions of sub-sec. 6 of sec. 248 of the Railway Act under which the plaintiffs would be required to seek relief from the Board of Railway Commissioners of Canada; that, however, is in fact, plainly not so; it was a new construction of a different character upon the other side of the bridge.

Therefore the plaintiffs are entitled to relief and there is nothing in the way of their coming into the ordinary Court of the land seeking it; or to prevent such Courts granting it: see *Kemp v. London, &c.*, 1 Ra. Ca. 504; *Simpson v. South Staffordshire, etc.*, 34 Ir. Ch. 327; and *River Dee, etc. v. North Midland, etc.*, 1 Ra. Ca. 154.

The appeal should be allowed and the defendants should be enjoined from continuing to trespass upon the bridge

in question as they have been doing ever since they began the erection of the poles and wires now complained of; no damages are, I understand, sought, and probably no substantial damage will have been sustained if the poles and wires be removed and the bridge made as good as it would be if they had never been erected; but the injunction should be stayed for three months to enable the parties to come to some agreement under which the lines may be carried over the bridge; or, failing that, so that the defendants may apply to the Board for such relief as they may think they are entitled to. And I desire to add that in all such cases as this it should be borne in mind that a municipality has no right to make use of its power, under the enactment in question, to exact money for ulterior purposes.

The defendants should pay the costs of the action and of this appeal.

MASTER IN CHAMBERS.

JANUARY 29TH, 1912.

CLARKSON v. McNAUGHT AND SHAW.

(AND THREE OTHER CASES.)

Judgment — Summary — Motion for under Con. Rule 603—Action on Promissory Notes—Defence Should be Dealt with at Hearing—Motion Refused.

In these four cases the plaintiff moved under Rule 603 for judgment on certain promissory notes.

F. R. Mackelcan, for the motion.

F. Arnoldi, K.C., contra.

CARTWRIGHT, K.C., MASTER:—These notes were all dated 20th December, 1907, and were payable on demand. They were protested for non-payment on 6th March, 1908. Therefore the plaintiff, who only alleges title at the earliest on 5th May, 1911, took them subject to all their equities.

It was said by Middleton, J., in the similar cases of *Stavert v. Barton and Macdonell*, 20 O. W. R. 597: "The defendants have all along contended that they have a right of indemnity against the Sovereign Bank if they are liable on the notes, and they now seek to contend that Clarkson has

in truth become a mere trustee for the Sovereign Bank and its shareholders, and is for this reason not entitled to recover against them. This defence they must be at liberty to set up and it is proper that it should be dealt with at the hearing."

The same contention is made in the present cases and the motions must therefore fail unless the plaintiff can succeed on the ground that the document given on 13th January, 1909, to Mr. Stavert by Mr. Arnoldi "on behalf of" the defendants is equivalent to a consent to entry of judgment whenever action should be taken by Mr. Stavert on those notes.

In any case even if that is the legal effect of this document (which is found at p. 20 of the joint appendix of exhibits and statutes to the appeal book in *Stavert v. McMillan*), the decision in *Pining v. Dawson*, 4 O. W. R. 499, in my reading of that judgment, shews that application must be made to a Judge in Court to have such agreement carried out.

This renders it unnecessary to consider two preliminary points which are by no means clear. The first is whether such an agreement is assignable as it was made only with Stavert. Then, if that is properly answered in the affirmative, it would still have to be determined if the indenture of 5th May, 1911, by which Stavert purported to assign to Clarkson all the trust estate, etc., carried with it the right to enforce the agreement of 13th January, 1909. The words used do not contain any express mention of this document. It certainly formed no part of the trust estate conveyed to Stavert as it was not at that time in existence.

Is it then included in the words "all books of account, papers, and other documents of the Sovereign Bank of Canada?"

This is a question on which opinions might well differ. Probably the existence of this document was not present to the mind of the draughtsman; and, even if the other two difficulties were got rid of, this might still prevent the success of the plaintiff's motions.

In my opinion they must be dismissed with costs to defendants in the cause.

I still adhere to what I said in the *Stavert Cases*, *supra*, 20 O. W. R., at p. 247, that the change from Stavert to Clarkson constituted for some purposes a new action; and

I am of opinion that this change in the situation thereby created might give the defendants the right to recede from the agreement with Stavert, even if otherwise binding on them.

In view of all these considerations it would be impossible to give summary judgment without acting in disregard of the judgment of the Divisional Court in *Farmers Bank v. Big Cities Realty* (1910), 15 O. W. R. 241.

HON. MR. JUSTICE MIDDLETON.

JANUARY 22ND, 1912.

HAY. v. SUTHERLAND.

Process—Service of Writ of Summons out of Jurisdiction—Order for Obtained on Ex Parte Motion—Motion to Set Aside Order and Writ Refused by Master-in-Chambers — Appeal Dismissed by Middleton, J.—Con. Rule 162 (9)—Joinder of Parties.

An appeal by the defendant from an order of the Master in Chambers, dismissing his motion to set aside an ex parte order, authorizing service upon him, and of the jurisdiction, of the writ of summons, and to set aside the writ and all proceedings based thereon.

Grayson Smith, for the appellant.

McGregor Young, K.C., for the plaintiff.

HON. MR. JUSTICE MIDDLETON:—A case is within subsec. "g" when it appears that the defendants are properly joined. The question of joinder must be determined quite apart from the residence of the defendants and entirely upon the rules regulating the joinder of parties.

If an action is properly brought against two persons who are both within the jurisdiction it can be said that either is a proper party to an action properly brought against the other, and so when either is out of the jurisdiction an order may be made for his service provided his co-defendant is first served.

This construction of the rule has been invariably adopted. Appeal dismissed with costs in any event.

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SUPREME COURT OF CANADA.

FEBRUARY 23RD, 1912.

NELLES v. HESSELTINE.

ON APPEAL FROM COURT OF APPEAL FOR ONTARIO.

Appeal to Supreme Court of Canada — From Court of Appeal for Ontario—Company—Promoters—Contract to Deliver Shares and Bonds—Breach of Contract—Reference to Ascertain Damages—Report Varied on Appeal—Final Judgment—Leave to Appeal—Time for Appealing—Jurisdiction of Supreme Court of Canada.

SUPREME COURT OF CANADA refused leave to appeal from judgment of Court of Appeal for Ontario, 20 O. W. R. 120, affirming judgment of MEREDITH, C.J.C.P., 18 O. W. R. 196, holding that the decision of the Court of Appeal was not a final judgment from which an appeal would lie to the Supreme Court of Canada.

Leave to appeal from judgment of Court of Appeal for Ontario, 11 O. W. R. 1062, refused and motion to extend time for appealing therefrom dismissed.

Goodall v. Clarke (1911), 44 S. C. R. 284, and

Skinner v. Crown Life Ins. Co. (1911), 44 S. C. R. 616, followed.

An appeal from a decision of the Registrar of the Supreme Court of Canada, refusing an application by the defendants to affirm the jurisdiction of the Court, and for an order granting leave to appeal from a judgment of the Court of Appeal for Ontario, 20 O. W. R. 120, and for an order extending the time for appeal if such order were necessary.

The notice of motion as filed was not properly framed, but the motion was argued before the Registrar as if the application made verbally had been contained in the notice of motion.

D. J. McDougal, for the defendants' motion.

W. L. Scott, for the plaintiff, contra.

CAMERON, K.C., REGISTRAR (18th January, 1912):—The facts of the case, shortly, are as follows:—The plaintiffs sued certain individuals, as well as the Windsor, Essex and Lake Shore Rapid Railway Company, claiming specific performance of an agreement, or damages for the breach thereof. The action was heard by Hon. Mr. Justice Clute and judgment pronounced on the 16th March, 1907, in favour of the plaintiffs. In the said judgment the Court directed that in a certain event there should be a reference to the local master at Sandwich to ascertain the value of certain stocks and bonds. An appeal was taken from this judgment to the Court of Appeal, where judgment was pronounced on the 21st April, 1908, allowing the appeal so far as it condemned the defendants personally, and varying, in other respects, the judgment of the Court below, see 11 O. W. R. 1062. No appeal was taken from that judgment.

The proceedings then went on before the Master, who made his report on the 7th April, 1909. From this report an appeal was taken which was heard by Hon. Sir Wm. Meredith, C.J.C.P., and judgment was pronounced on the 23rd January, 1911, varying the report of the Master, see 18 O. W. R. 196. The next proceeding shewn in the appeal book is an order made by the Chancellor, dated 8th March, 1911, which recites as follows:—

Upon motion made unto the Court, etc., by way of further directions, and to dispose of the question of costs, and for judgment against the above named defendants, etc., and proceeds to order the defendants to pay the plaintiffs certain sums of money and the costs incidental to the reference and of the motion.

On the 29th of May, 1911, Hon. Mr. Justice Garrow of the Court of Appeal, after reciting that the defendants had given notice of appeal to the Court of Appeal from the judgment of the Chief Justice of the Common Pleas Division, dated 23rd January, 1911, and also from the judgment of the Chancellor of the 8th March, 1911, and further reciting that it appeared that an appeal would lie from the Court of Appeal to the Supreme Court of Canada, granted leave to appeal direct to the Court of Appeal from both judgments, and consolidated the two appeals. These appeals came on for hearing before the Court of Appeal and judgment was pronounced on the 28th September, 1911, whereby they were dismissed, see 20 O. W. R. 120. Security was allowed within sixty days for the purposes of an

appeal to the Supreme Court, and the present application is now made which raises the question of the jurisdiction of the Court.

The motion before me also includes an application to affirm the jurisdiction of this Court to hear an appeal from the judgment of the Court of Appeal of the 21st April, 1908, dismissing the appeal from the judgment of the Hon. Mr. Justice Clute at the trial, see 11 O. W. R. 1062.

As to the last application I hold that the Supreme Court has no jurisdiction. Section 69 requires the appeal to be brought within sixty days. This time may be extended, under sec. 71, by the Court below but not by the Supreme Court.

Secondly, I hold that, under the decision of the Supreme Court in *Clarke v. Goodall*, 44 S. C. R. 284, no appeal lies to the Supreme Court from so much of the judgment of the Court of Appeal, dated the 28th September, 1911, as affirms the judgment of Meredith, C.J., of the 23rd January, 1911, varying the report of the Master. In holding that no appeal lies from this judgment, I am not to be taken as being of the opinion that the Supreme Court may not, in dealing with an appeal from the final judgment, open up any interlocutory judgment of the Court of Appeal or any other Court below in this matter.

Mr. Scott contends that no notice of appeal to the Supreme Court from the Court of Appeal was given as required by section 70, but I hold that the words of that section, "motion to enter a verdict or nonsuit upon a point reserved at the trial," do not apply to a case where judgment is given at the trial disposing of the right of the parties with a reference to determine the amount.

The only question then remaining for me to determine is whether the Supreme Court has jurisdiction to hear an appeal from so much of the judgment of the Court of Appeal as affirmed the judgment of the Chancellor on further directions.

Section 36 of the "Supreme Court Act" provides generally that "an appeal shall lie to the Supreme Court from any final judgment of the highest Court of final resort, etc., in cases in which the Court of original jurisdiction is a superior Court." The present case falls within this section. The judgment is undoubtedly a final judgment, as was the judgment of the Chancellor on further directions. It is a judgment of the Court of Appeal and, therefore, of

the highest Court of final resort in Ontario, and the case arose in a superior Court. The provisions of section 48, limiting appeals from the province of Ontario, it is admitted, do not exclude this case from the jurisdiction of this Court. The judgment of the Chancellor on further directions condemns the defendants to pay to the plaintiff Nelles the sum of \$10,648.90, and to the plaintiff Newman the sum of \$17,352.20. To my mind, therefore, there is no doubt that the case falls fully within the provisions of the "Supreme Court Act," and there is jurisdiction to hear an appeal from the judgment of the Court of Appeal in so far as it affirms the judgment of the Chancellor.

An appeal was taken from the decision of the Registrar to Hon. Mr. Justice Anglin which was referred by him to the Full Court and was heard on the 29th of February. The appeal was from so much of the order of the Registrar as held that no appeal lay to the Supreme Court, except from that part of the judgment of the Court of Appeal as affirmed the judgment of the Chancellor. The order of the Registrar was affirmed and the motion dismissed.

HON. MR. JUSTICE IDINGTON (February 23rd, 1912):— It does not appear to me that we can properly aid the appellant by assenting to his motion. Without a more intimate knowledge of the questions involved than is to be obtained on such a motion and argument properly relevant thereto, it does not appear to me that we can satisfactorily deal with the matter in an absolutely final manner.

However, nothing advanced in argument (and I think all was said) relative to the nature of the facts and legal issues raised in the pleadings and to the nature and intention of the first judgment and of the judgment on appeal therefrom seemed to me to furnish ground for holding out much hope of our being ever able to find that judgment reviewable on the proposed appeal.

Besides the cases of *Clark v. Goodall*, 44 S. C. R. 284, and *Crown Life v. Skinner*, 44 S. C. R. 616, cited in argument, does not the principle upon which the judgment in the case of *McDonald v. Belcher*, [1904] A. C. 429, proceeded, stand as an impassable barrier? See the approving reference therein, page 436, to the case of *International Financial Society v. City of Moscow*, 7 Ch. D. 241 and 247.

Does not the law in Ontario "in such cases confer a most important right on one of the litigants by ordering that there shall be an end to the litigation" so far as concerns the field of dispute such a judgment covers? Why should a man spend thousands of dollars, as sometimes happens, on a reference with a basis to rest on as shifting as the sands?

I think the motion must be dismissed with costs.

If a right of appeal here is a desirable thing in such cases, there are three ways of getting it. One is to have the learned trial Judge so frame his judgment as to enable it and then litigants will know what is in store for them. Another is an application to the Court of Appeal for leave to come here; and the third is to induce Parliament to say so, if it will.

All these Courts may answer there is such a thing as too much of a good thing.

DIVISIONAL COURT.

JANUARY 24TH, 1912.

PARSONS v. CITY OF LONDON.

3 O. W. N. 604.

Municipal Corporations—Power of Municipal Council—Sale of City Hall—Action to Restrain—Courts not an "Upper Chamber" of the Council.

DIVISIONAL COURT dismissed plaintiff's appeal from a judgment of MIDDLETON, J., 20 O. W. R. 534, 25 O. L. R. 172, with costs.

Plaintiff's appeal to Divisional Court was heard by HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B., HON. MR. JUSTICE BRITTON, and HON. MR. JUSTICE RIDDELL, on 24th January, 1912.

N. W. Rowell, K.C., and C. G. Jarvis, for the plaintiff.

T. G. Meredith, K.C., for the defendant municipality.

J. B. McKillop, for the defendants the Royal Bank of Canada.

THEIR LORDSHIPS (V.V.) dismissed the appeal with costs.

SUPREME COURT.

DECEMBER 6TH, 1911.

BRULOTT v. GRAND TRUNK PACIFIC R.W. CO.

13 Can. Ry. Cas. 95.

ON APPEAL FROM COURT OF APPEAL FOR ONTARIO.

Negligence — Railway — Plaintiff Crushed Between Cars — Action under Workmen's Compensation Act — Negligence of Fellow-servant — Person in Superintendence — Voluntarily Accepting Risk — Trial — Necessity for Jury — Sufficiency of Questions put and Answered — Refusal of Trial Judge to Submit Additional Questions — Discretion — Railway Act, s. 306.

Plaintiff and T. were both employed by defendants. Plaintiff was assisting T. in repairing a car standing on a track in defendants' yard, when a yard-engine propelled other cars against the car under repair, and injured plaintiff, who brought action to recover damages, under Workmen's Compensation Act, alleging negligence on the part of T., a person in superintendence to whose orders plaintiff was bound to conform and did conform, in not placing a flag or flags in a position to give warning that work was going on upon the track. At trial, the jury, in answer to questions, found: (1) that plaintiff's injuries were caused by negligence of defendants; (2) that the negligence was the neglect of T. in not placing the flag for protection; (3) that plaintiff's injuries were caused by the negligence of a person in a position of superintendence over plaintiff and to whose orders he was bound to conform; (4) that T. was that person, and his negligence consisted in not placing the flag; (5) that plaintiff's injuries were not caused by his own want of care; "it was no part of his duty to place these flags;" and they assessed the damages at \$1,980.

After counsel had addressed the jury, and when the Judge was about to begin his charge, a discussion arose about the frame of two of the questions proposed to be submitted to the jury, in the course of which defendants' counsel suggested another question: "Did plaintiff voluntarily perform the acts which caused his accident, knowing of the dangers which he ran?" This defence was not set up in the pleadings nor previously at the trial; and no application was made for leave to amend or to reopen the case or postpone the trial, FALCONBRIDGE, C.J.K.B., declined to submit the question, saying that he did not think it fair to introduce it at that stage.

COURT OF APPEAL FOR ONTARIO, 19 O. W. R. 514, 24 O. L. R. 154, 13 Can. Ry. Cas. 76, *held* (MEREDITH, J.A., *dissenting*), that the trial Judge exercised a proper discretion in refusing to submit the additional question to the jury.

That notwithstanding that the jury had not found that T. was exercising superintendence at the time of the injury, and had not found that plaintiff did conform to T.'s orders, yet, having regard to the evidence and the Judge's charge, the findings were sufficient, under the Workmen's Compensation Act, to support a judgment for plaintiff.

Marley v. Osborn (1894), 10 T. L. R. 388, specially referred to.

SUPREME COURT OF CANADA held that s. 306 of the Railway Act was not applicable to the facts of this case, and *volens* should have been specially pleaded.

Judgments of Court of Appeal for Ontario and of Falconbridge, C.J.K.B., affirmed.

An appeal by the defendants from a judgment of the Court of Appeal for Ontario, 19 O. W. R. 514, 24 O. L. R. 154.

The appeal to the Supreme Court of Canada was heard by HON. SIR LOUIS DAVIES, J., HON. MR. JUSTICE IDINGTON, HON. MR. JUSTICE DUFF, and HON. MR. JUSTICE BRODEUR, on 15th November, 1911.

The facts are fully set out in the judgment of the Court of Appeal for Ontario.

D. L. McCarthy, K.C., for the appellants, contended that the learned trial Judge was in error in declining to submit the question to the jury as to whether the plaintiff voluntarily performed the acts which caused his accident, knowing of the danger which he ran, distinguishing *Marley v. Osborn*, 10 T. L. R. 388, and relying on *Bunker v. Midland R.W. Co.*, 31 W. R. 231.

In *Montreal Park & Island R.W. Co. v. McDougall*, 36 S. C. R., at p. 5. it is stated that to constitute a defence of voluntary performance there must be "such knowledge as, under the circumstances, leaves no inference open, but the one that the workman had voluntarily incurred the risk, and that must be found as a fact."

The learned trial Judge, he submitted, failed to direct the jury to find on this question of fact, which would have been a good defence had the jury found in the affirmative.

In the case of the *Canada Foundry Co. v. Mitchell*, 35 S. C. R. 452, it was held that, to constitute a defence of this kind, the defendant must have a finding by the jury that the person injured voluntarily incurred the risk unless it so plainly appeared from the plaintiff's evidence as to justify the trial Judge in withdrawing it from the jury and dismissing the action.

He submitted that there was quite sufficient evidence to justify the adoption of the latter course in the present instance, but, failing that, appellants submitted that they were entitled to have the direct finding of the jury on that point.

In view of the fact that counsel had concluded their addresses, and that, as the jury had not yet been charged, no questions had been submitted to them for consideration,

appellants fail to appreciate the objection of the learned Chief Justice to submitting the question, as he said, "at this stage." The question was in issue; the plea covered it, for R. S. C. 6 Edw. VII., ch. 37, sec. 306, which was pleaded, expressly allowed defendant to plead the general issue.

Where, it is respectfully submitted, is the objection to direct the jury to find on an important question such as this, in view of the decision of this Court in *Canada Foundry Co. v. Mitchel*, 35 S. C. R. 452 as to the necessity of such a finding?

It was submitted that there was no evidence to support the verdict of the jury, but that, even on the findings, judgment should have been entered for defendants: *Hooper v. Holm*, 12 T. L. R. 537, affirmed 13 T. L. R. 6. Orders to which the plaintiff is bound to conform are of such a nature, that the relative position of the parties cause the one to owe obedience to the other, and the order to be such that it cannot be disobeyed without contumacy: *McManus v. Hay*, 9 R. 425, at p. 429.

It was submitted that Teasdale was not "in a position of superintendence." The Act, sec. 2, sub-sec. 1. defines superintendence as being such as is exercised by a foreman or person in like position to a foreman. The words of the learned Chief Justice virtually amounted to a direction to the jury to find that Teasdale was a person to whose orders plaintiff was obliged to conform, and did conform. But this was a question of fact: *Dolan v. Anderson*, 22 Sc. L. R. 529, and should have been left to the jury under proper direction.

The person to give directions must be a person in a position of superiority—giving directions to the other person, which the latter is bound to obey: *Howard v. Bennett*, 58 L. J. Q. B. 129, 60 L. T. R. 152, 5 T. L. R. 136, and mere directions from one workman to another are not orders. It has been held in Scotland that where a man can judge for himself, and elects to do the work he is told to do, and is injured, no action will lie: *Wilson v. Caledonian Railway Co.*, 37 Sc. L. R. 235, 2 F. 48. Also, that the order to which plaintiff was bound to conform, and did conform, must be one which must have the effect of superseding the exercise of the workman's own private judgment and discrimination, and substituting therefor the behest of the person to whose directions he is bound to conform. The fact that the workman is generally under the orders and directions of the per-

son giving the order is not sufficient: *Carravan v. Green & Co.*, 8 F. 275, 43 Sc. L. R. 200. In *Yarmouth v. France*, 19 Q. B. D. 647, there was a positive order, "Go on, you must keep driving," given by the foreman, when plaintiff objected to the risk, and the foreman added that he took, as representing the employer, full responsibility for any accident.

A foreman employed by a railway company is not a person with whose orders an employee is "bound to conform," when he orders an act of disobedience to the rules of the company: *Bunker v. Midland R.W. Co.*, 47 L. T. R. n.s. 476. This is not overruled by *Marley v. Osborn*, 10 T. L. R. 388. The former case, though cited in the County Court, is not referred to in the judgment of Cave, J., and the cases, it is submitted, are clearly distinguishable, and must be read together. In the first, there is a clear disregard of a rule of a railway company, which is known by plaintiff to be in force; in the second, a shop regulation which, according to the shop foreman, had been disregarded for some time, is merely disregarded as usual, and the Court held that it was no part of plaintiff's duty to go into the question whether such disregard and the consequent order to him were right or wrong.

This Court has frequently insisted on the observance of railway rules by employees of companies: *Grand Trunk R.W. Co. v. Birkett*, 35 S. C. R. 296, 5 Can. Ry. Cas. 54; *Harris v. London Street R.W. Co.*, 39 S. C. R. 398; *Grand Trunk R.W. Co. v. Miller*, 32 S. C. R. 545, 2 Can. Ry. Cas. 350.

The distinction between the above cases may be expressed in the words of the judgment of this Court in *Warmingham v. Palmer*, 32 S. C. R. 126.

T. N. Phelan, for the respondent, submitted that it was clear on the undisputed evidence that the doctrine of *volenti non fit injuria* did not apply in this case. There must not only be *volenter* but also *scienter*. Did the plaintiff have full knowledge of his risk? He knew the flags had not been placed, but he had also been informed by the superintendent that the yard engine was three miles away. It was upon that assurance that he placed himself in a position of danger, not knowing that it was dangerous. That being so, how could it be said that he assumed the risk with a full knowledge of the facts.

The defendants have urged that there was a rule that flags should be placed by workmen, and that the plaintiff is not entitled to succeed as he was guilty of a breach of this rule.

It is clear from the evidence that no such rule that flags should be placed has positively been shewn to exist. Even if there were a rule, it make the duty of Teasdale still stronger to see that the rule was enforced. He referred to *Smith v. Baker*, [1891] A. C. 325; *Yarmouth v. France* (1887), 19 Q. B. D. 647; *Sims v. Dominion Fish Co.*, (1901), 2 O. L. R. 69; *Canada Foundry v. Mitchell* (1904), 35 S. C. R. 452; per Davies, J., at pp. 454, 455; *Campbell v. Ontario Lumber Co.* (1904), 3 O. W. R. 235; *Marley v. Osborn* (1894), 10 T. L. R. 388.

HON. SIR LOUIS DAVIES, J. (*dissenting*):—I have reached the conclusion in this case that the trial Judge was wrong in refusing to put to the jury the question desired and asked to be put by the counsel for the company as to whether the plaintiff voluntarily and with full knowledge and appreciation of the risk he was running entered upon the work in the doing of which he received his injuries.

I think there was ample evidence to go to the jury on the question and that the refusal to put the question entitles the plaintiff to a new trial.

It was urged that the finding of the jury against contributory negligence disposed fully of the question of volenter. I do not agree with this. The learned Judge explicitly refused to allow the question of volenter to go to the jury on the ground that it had not been pleaded. The jury under such circumstances in holding that the plaintiff was not guilty of contributory negligence would never dream that they were answering in the negative a question which the learned Judge had distinctly said he would not leave to them.

I think under the circumstances the defendant company is entitled to a new trial so that this crucial question might be answered.

HON. MR. JUSTICE IDINGTON:—The appellants claim that the respondent had voluntarily undertaken the risk of dispensing with the use of the flags usually employed to protect workmen engaged in the dangerous employment in which he was engaged at the time of the accident out of

which this action arises, and in any event was not, under the circumstances involved, acting in obedience to one in a position of superintendence over him, and to whose orders he was bound to conform.

One answer to the first contention is that the appellants did not plead such voluntary undertaking.

Counsel for appellants points to the plea of not guilty by statute, which was pleaded along with other pleas.

But the statute referred to in the margin of the plea of not guilty is sec. 306 of the Railway Act, which is not applicable to the facts herein.

The case of *Williams v. Birmingham*, [1899] 2 Q. B. 358, seems clearly to hold that a plea is necessary to raise the application of the doctrine of *volenti non fit injuria*; but see *Degg v. Midland R.W. Co.*, 1 H. & N. 773, at p. 783.

If, as I incline to think, it must be raised by a plea besides not guilty, then surely it was too late after the addresses of counsel at the close to the jury, to insist, as counsel claims he had a right to insist, on the learned Chief Justice trying the case to put a question to the jury which could only rest on such a plea.

At that stage even had he asked to amend I should be very chary of saying the learned trial Judge erred in refusing it unless in a much clearer case than is here in evidence.

It cannot fairly be said that the issue was fought out on any such line.

It would rather seem to have been something analogous thereto, but clearly not that issue which was in fact tried.

And when we look at the facts apparent in the evidence on which a defence is attempted to be raised and we find that such consent, if consent it can be called, as the plaintiff gave, was entirely dependent on a state of facts represented to him as existent, which in truth did not exist, how can the defence be supported?

The representation made to him was that the usual risk attendant upon working without flags being placed did not exist, for there was not an engine within three miles from the place the work was to be done and within the five minutes represented as all that was needed for the work, an engine pushed the cars upon them.

Clearly the foreman in charge either wilfully misrepresented the facts or was grievously mistaken.

In any way one can look at the matter, this defence does not seem to have been open to appellants.

Much less did any ground exist for insisting as of right upon the question being put or amendment being made even if it had been claimed.

As to the other branch of the defence that the plaintiff did not act in conformity to the order of one in a position of superintendence over him and to whose order he was bound to conform, there is abundant evidence to entitle the jury to find as they did, and there is no objection taken to the learned trial Judge's charge relative to this defence or issue.

The plaintiff swears positively this man Teasdale was his boss, that he was directed by his shop foreman to place himself in a position where he must obey such orders as Teasdale gave.

It must not be forgotten that there was no such rule of prohibition regarding the doing of the work without the flags as does sometimes exist in the like cases.

It was merely a practice existent.

If railway companies desire the protection arising or likely to arise from the observance of such a practice, they must clearly place their servants in a position to disobey any order to the contrary when given by men in a position of superintendence.

The men are entitled to be assured that if they disobey such orders of one in a position of superintendence they will be protected in such disobedience.

It should not be left for a moment in doubt what the man's rights are.

The work was not being done on a completed road where the usual printed rules are laid down for the guidance of all concerned, and where the superintendent and the man are both bound to observe the written rule.

I am not to be understood as implying that the men have a right to discard either practice or regulation of a less imperative nature than such as the written regulations I refer to.

In such cases of practice or other regulation each case must stand on its own bottom. The practice or other unwritten regulation may be more or less flexible and the facts in each case as to its terms "constancy" and "observance" may all have to be considered by Court or jury in order to determine its applicability.

In some cases rules are often made merely to be broken.

It would have seemed to be an ungracious thing for a man to have disobeyed giving a lift of a few minutes to a piece of metal whilst the foreman slipped the bolt into its place.

A request may in truth be a command.

If foremen were plainly given to understand instant dismissal would follow the making of such requests as this one made, and men under them saw such understanding or direction followed up by dismissal and that systematically adhered to in practice throughout the entire service, we would have fewer accident cases to hear.

I think the appeal should be dismissed with costs.

HON. MR. JUSTICE DUFF:—Mr. McCarthy based his appeal on one contention and the only question before us is the question raised by that contention. The contention is this: "that there was a mistrial because of the refusal of the learned Chief Justice of the King's Bench Division to submit to the jury the defence that the victim of the accident had agreed or consented to accept the risk of dispensing with the signal. I shall assume that on the pleadings the appellant company was entitled to raise that defence. The only doubt I have upon that point is whether sec. 306 of the Railway Act has any application at all. On that question, in the view I take, it is unnecessary to pass and I consequently express no opinion concerning it. I think the defence of *volenti non fit injuria* was in effect submitted to the jury and was adjudicated upon by them, and I think so for this reason. The jury found that, in dispensing with the signal, Brulott's superior was negligent. If they had been specifically asked the question they could not have concluded that Brulott voluntarily concurred in the act of his superior (which they found to be negligence in the superior), with full knowledge and appreciation of the risk he was thereby incurring (which they must have found to give effect to the defence suggested) without coming to the conclusion at the same time that Brulott's conduct in concurring in what was done was marked by a want of ordinary care for his own safety and a want of care which must have materially contributed to the result complained of. In a word, they could not give effect to the proposed defence without drawing inferences which would necessarily

involve the conclusion that Brulott was guilty of contributory negligence. The issue of contributory negligence was submitted to them and, on that, they found for the respondent. It seems clear, therefore, that if the learned Chief Justice erred it was in form only and that the appellants have suffered no substantial wrong.

HON. MR. JUSTICE ANGLIN:—The defendants appeal from the judgment of the Court of Appeal for Ontario, upholding a verdict for the plaintiff under the Ontario Workmen's Compensation Act. They base their appeal upon two grounds: (1) that for lack of a finding that the injury to the plaintiff resulted from his having conformed to an order or direction of a person in the employ of the defendant to whose orders or directions he was at the time of the injury bound to conform, the verdict cannot stand; (2) that, although asked by counsel for the defendants before he charged the jury to put to them the question, whether or not the plaintiff voluntarily accepted the risk attendant upon working as he did without the protection of flags, the learned trial Judge refused to submit this issue.

At the trial all parties appear to have assumed that the questions submitted to the jury involved their determining whether the plaintiff, when injured, was or was not acting under an order of his temporary foreman, Teasdale. That the learned trial Judge intended to have the jury pass upon this question is made manifest by his observation in dealing with the motion for nonsuit:—

“I think it is for the jury to say whether what passed did not amount to a direction from his superior to go on and do it without the flag: I do not think I could withdraw it from the jury.”

The failure of counsel for the defendants to object on this ground to the sufficiency of the questions prepared by the learned Chief Justice for the jury presents a serious obstacle to his success in this Court. But it is unnecessary to dwell further on this aspect of the case because there is a distinct finding that negligence on the part of Teasdale, while in the exercise of superintendence entrusted to him by the defendants, was the cause of the plaintiff's being injured. This finding suffices to sustain the verdict under sub-sec. 2 of sec. 3 of the statute, although it should be held fatally defective under sub-sec. 3 for lack of the specific find-

ing that the injury resulted from the plaintiff's having conformed to an order of Teasdale. That Teasdale was a person who had superintendence entrusted to him was not seriously controverted at bar in this Court; and, it is stated in the charge of the learned Chief Justice that this was conceded at the trial. Subject to the question of volens, the evidence fully warrants the finding that Teasdale was negligent in his superintendence and that such negligence was the cause of the injury to the plaintiff.

In refusing to put to the jury the specific question asked for by Mr. McCarthy upon the issue of volenter, the learned Chief Justice appears to have been of the opinion that under the plea of "not guilty by statute" it was not open to the defendants to urge this defence, and that it was, therefore, entirely discretionary with him to submit or to withhold this issue from the jury. That also seems to have been the view of the majority of the Judges in the Court of Appeal. So great is my respect for all those learned Judges that I find it difficult to believe that they could have misconceived the true scope of the plea of the defendants. But as this case may, in my opinion, be disposed of upon another ground, I desire to abstain for the present from committing myself to the proposition that the general issue raised by the plea of not guilty does not involve a traverse of the existence of the duty to the plaintiff in the breach of which the negligence charged consists and that evidence of volenter to negative such a duty is, therefore, not admissible under it. Moreover, I wish also to reserve for future consideration, should it present itself for decision, the question whether under sec. 306 of the Railway Act, R. S. C. 1906, ch. 37, it is open to a defendant railway company to plead the statutory defence of not guilty or the general issue in such an action as the present.

The issue of contributory negligence was clearly submitted to the jury in questions and under a charge to which no exception has been taken. Although, as pointed out by Bowen, L.J., in *Thomas v. Quartermain*, 18 Q. B. D. 685, at p. 697:—

"The doctrine of volenti non fit injuria stands outside the defence of contributory negligence and is in no way limited by it, in individual instances the two ideas seem to cover the same ground."

In the present instance, upon the evidence before the jury, it seems to me impossible that they could consistently have found the plaintiff volens while affirming negligence on the part of the defendants and negating contributory negligence on his part. If volens, he was a fortiori reckless and negligent. In order to find him volens the jury must have been satisfied that, with full knowledge and appreciation of the risk he incurred in working without the protection of flags, he freely and without any compulsion, either of an immediate order, or arising from fear of dismissal or serious reproof, assumed that risk as his own. *Smith v. Baker*, [1891] A. C. 325, at p. 355; *Yarmouth v. France*, 19 Q. B. D. 647, at p. 661. Assuming for the moment that, notwithstanding evidence upon which they would make such a finding against the plaintiff, a jury could find negligence on the part of the defendants, I am unable to understand how they could acquit the plaintiff of contributory negligence. The logical result of such a finding would, no doubt, be that negligence of the defendants had not been established because they did not owe to the plaintiff the duty with breach of which they were charged. But, if the evidence justified findings that the defendants were negligent and that the plaintiff was free from contributory negligence, in my opinion, in the peculiar circumstances of this case, it necessarily precludes a finding that the plaintiff was volens. The findings of negligence and of absence of contributory negligence have not been questioned. Whether either or both could or could not have been successfully attacked it is too late now to enquire.

It follows that, although the trial would probably have been more satisfactory had there been an express finding upon that issue, that the deceased was not volens is really involved in the unimpeached findings of the jury, and that no wrong or miscarriage has resulted from the refusal put to them the specific question demanded by the defendants.

The appeal, therefore, fails and should be dismissed with costs.

HON. MR. JUSTICE BRODEUR:—The appellants relied almost entirely in their argument before this Court on the maxim *volenti non fit injuria*. In their statement of defence they had not alleged that fact and the question had not been put in issue.

Nevertheless it was found by the jury that the respondent's injuries were caused by the negligence of the appellants in not placing a flag for protection, and that he was acting under the orders of a superintendent whose duty was to place that flag. He was not a free agent in the circumstances and the maxim does not apply.

The appeal should be dismissed.

Appeal dismissed with costs.

HON. MR. JUSTICE KELLY.

JANUARY 25TH, 1912.

MACPHIE v. TREMBLAY.

3 O. W. N. 605.

Cancellation of Instruments—Assignment by Insolvent Partnership for Benefit of Creditors—Lands Purchased by Wife of Insolvent Partner—Action by Assignee to Set Aside Conveyance Thereof as Fraudulent and Void against Creditors — No Evidence of Fraud—Action Dismissed with Costs—Wife's Property no Part of Partnership Assets.

Action to set aside a conveyance was tried at North Bay on the 12th December, 1911, without a jury.

G. A. McGaughey, for the plaintiff.

G. T. L. Bull, for the defendants.

HON. MR. JUSTICE KELLY:—The plaintiff, to whom Boulanger and Tremblay (a firm of which the defendant Peter Tremblay was a member), made an assignment for the benefit of their creditors on May 30th, 1910, claims that certain property purchased by the defendant, Evelina Tremblay, wife of the defendant Peter Tremblay, was purchased or acquired, and buildings erected thereon, out of the funds or assets of the insolvent firm, and that such property should be declared a part of the firm's assets. Plaintiff also asks that a conveyance of the lands and property in question by defendants, Peter Tremblay and Evelina Tremblay, to defendant Routhier, on or about September 27th, 1910, be declared fraudulent and void as against the creditors of Boulanger and Tremblay.

The only evidence offered at the trial was that of defendants, Peter Tremblay and Evelina Tremblay, both of

whom were called by the plaintiff. The evidence satisfies me beyond any doubt, and I find, that the moneys used in the purchase of the property in question and in the erection of the buildings thereon, and which plaintiff claims belonged to Boulanger and Tremblay, were the moneys of the defendant Evelina Tremblay, and did not belong to Boulanger & Tremblay, or to defendant Peter Tremblay; and the property and buildings formed no part of the assets of the insolvent firm.

No evidence was offered to substantiate the claim that the deed to defendant Routhier was fraudulent and void. I therefore, dismiss the plaintiff's action with costs.

MASTER IN CHAMBERS.

JANUARY 31ST, 1912.

CALDWELL v. HUGHES.

3 O. W. N. 639.

Particulars—Motion by Plaintiff for Further Particulars of Statement of Defence and Counterclaim—Postponement Till after Examination of Defendant for Discovery — Leave Given to Examine before Pleading to Counterclaim.

Motion by plaintiff for further particulars of statement of defence and counterclaim.

H. E. Rose, K.C., for the motion.

D. Inglis Grant, for the defendant.

CARTWRIGHT, K.C., MASTER:—The action is brought by the plaintiff as administratrix to have a settlement of the business done by her deceased husband with the defendant. The whole matter is one of account and will probably be referred unless some settlement is reached by the parties.

The statement of defence and counterclaim consists of 30 paragraphs and is very unusually minute and detailed.

Particulars were demanded of 17 of these—and have been furnished as to some of them. There was no written agreement in this case.

The best disposition of the motion will be to let it stand until after examination of defendant for discovery. The plaintiff can plead now and have leave to amend afterwards if necessary or if preferred by plaintiff this examina-

tion can be had before pleading, following the principle of *Townsend v. Northern Crown Bank*, 14 O. W. R. 727.

It is to be remembered that particulars at this stage are asked for pleading and plaintiff not being aware of the facts is entitled to all necessary information and this can be best obtained by discovery.

DIVISIONAL COURT.

FEBRUARY 6TH, 1912.

HELLER v. GRAND TRUNK R.W. CO.

3 O. W. N. 642.

Negligence—Railway—Passenger—Travelling on Pass—In Charge of Horse—Special Contract—Company to be Free from Liability in Case of Death, Injury or Damage—Whether Caused by Negligence of Company, its Servants or Otherwise.

DIVISIONAL COURT affirmed judgment of MULOCH, C.J.Ex.D., 20 O. W. R. 478, 25 O. L. R. 117.

An appeal from the judgment of the Chief Justice of the Exchequer Division, whereby he dismissed the action.

The facts are set out with sufficient elaboration in the report of the case below, 20 O. W. R. 478; 25 O. L. R. 117. The plaintiff now appeals.

The appeal to Divisional Court was heard by HON. SIR GLENHOLME FALCONBRIDGE C.J.K.B., HON. MR. JUSTICE BRITTON, and HON. MR. JUSTICE RIDDELL.

W. S. Brewster, K.C., for the plaintiff, appellant.

I. F. Hellmuth, K.C., for the defendants, contra.

HON. MR. JUSTICE RIDDELL:—I am wholly in accord with the judgment, and think it cannot be set aside. Even were the conclusions of the learned trial Judge erroneous in respect of the meaning of the word "impairing" in the statute—and I am of opinion they are not—the clause in the contract is not in my view such as that it destroys the "liability in respect of the carriage of any traffic." "Traffic" means the traffic of passengers, goods and rolling stock without discrimination. Railway Act, sec. 2 (31)—both plain-

tiff and his horse were traffic and carried under the one contract—the provision that the company should not be liable for injury to him is not a destruction of all liability under the contract of carriage, but a limitation to the goods carried. This, I think, comes within sec. 340 (2) of the Act.

As to the ground upon which the trial Judge proceeded, I think a remark by my Lord during the argument illuminates the whole question. Counsel admitted in answer to the Chief Justice that a destruction of the liability was an “impairing” of it—of course, the converse is not universally true, the sentence is not convertible, an impairment is not necessarily a destruction. But the “impairing” is a genus including destruction as a species—the word “impairing” is a generic term including “destruction.” And there is nothing which indicates that “impairing” is used in a less narrow sense.

I agree also in the reasoning of the learned trial Judge. The appeal should be dismissed with costs.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—I find myself constrained to hold that the judgment ought to be affirmed on the short ground that there is some liability left under the original contract, and it is destroyed only as to the carriage of passenger. By sec. 2, sub-sec. (31) of the Railway Act “traffic” means the traffic of passengers, goods and rolling stock.

I do not wish to be understood as in other respects not agreeing with the reasoning of the Chief Justice of the Exchequer Division.

There is an interesting discussion of the meaning of the word “impair” as used in the constitution of the United States in *Blair v. Williams* (1823), 4 Littell (Ky.), at p. 69.

HON. MR. JUSTICE BRITTON:—I agree in the result.

DIVISIONAL COURT.

FEBRUARY 6TH, 1912.

STERLING BANK v. LAUGHLIN.

3 O. W. N. 643.

Banks and Banking—Bill of Exchange—Endorsed by Payee to Bank—Presented for Payment Through Clearing House—Accepted by Drawee Bank—Acceptance of Drawee Bank as Debtor—Drawee Bank Failed—Rights against Endorser.

Defendant endorsed a draft to plaintiff bank and received the money thereon. Plaintiff bank sent the draft to the clearing house and was accepted by the drawee bank, the Farmers' Bank of Canada. Later the Farmers' Bank failed, and the plaintiff bank brought action to recover amount paid defendant.

DIVISIONAL COURT *held* that plaintiffs had accepted the Farmers' Bank as their debtor and could not recover from defendant as there was no evidence to render defendant subject to the rules of the clearing house. Action dismissed.

An appeal by the plaintiffs from a judgment of the Third Division Court of Peel County, dismissing an action to recover \$115.50, the amount of a draft upon the Farmers' Bank of Canada, in favour of the defendant, and endorsed by her to the plaintiffs.

The appeal to Divisional Court was head by HON. SIR JOHN BOYD, C., HON. MR. JUSTICE LATCHFORD, and HON. MR. JUSTICE MIDDLETON.

Casey Wood, for the plaintiff, appellant.

B. F. Justin, K.C., for the defendant, respondent.

HON. SIR JOHN BOYD, C.:—I think the judgment should not be disturbed. Treating this as an isolated transaction the defendant is not in any way to blame. She sells the draft from the Farmers' Bank and indorses it to the plaintiffs at Alton, in order to receive its value. She knows more of the transaction, and funds were then in the Farmers' Bank available for its payment: but the plaintiffs failed to collect the amount from the Farmers' Bank, because of their failure to pay on the 19th of December. She received the money on the 16th of December, and the draft was forwarded to the Toronto office of the Sterling Bank on the same day, and was received at 8.30 o'clock on the morning of the 17th, too late to be sent to the clearing-house that day, which was Saturday.

It went through the clearing-house at 10 a.m. on Monday, and was received by the Farmers' Bank and stamped as their property on the 19th. This indicated a change in the relations of the two banks, which, I think, may be properly considered as exonerating the defendant from any liability to refund the money to the Sterling Bank. There is no evidence given that she is, or was, aware of, or is to be bound by the dealings sanctioned as between the banks by their voluntary association in the clearing-house system. That is a matter not binding per se on the public unless it can be assumed or proved that the party sought to be charged has been dealing with the bank subject to the usages of the clearing-house. No such evidence was given in this case, and the inference to be drawn from what was in evidence was, that the Farmers' Bank had become debtor to the plaintiffs for this instrument.

The appeal is dismissed with costs.

HON. MR. JUSTICE LATCHFORD and HON. MR. JUSTICE MIDDLETON, agreed.

DIVISIONAL COURT.

FEBRUARY 7TH, 1912.

McKINLEY v. GRAHAM.

3 O. W. N. 645.

*Will—Administration of Estate — Executors — Breach of Trust—
Devolution of Estates Act—Action to Enforce Charge on Lands
—Statute of Limitations—Application.*

DIVISIONAL COURT affirmed judgment of BRITTON, J., 20 O. W. R. 441.

An appeal by the plaintiff from a judgment of HON. MR. JUSTICE BRITTON, 20 O. W. R. 441.

The appeal to Divisional Court was head by HON. SIR JOHN BOYD, C., HON. MR. JUSTICE LATCHFORD, and HON. MR. JUSTICE MIDDLETON.

J. Shilton, for the plaintiff, appellant.

H. L. Ebbels, for the defendant, executors.

H. C. Macdonald, for the defendant, Charles Harper, jr.

HON. SIR JOHN BOYD, C.:—The provisions of this will were considered in April, 1890 (see *Harper v. Graham*, in my book of that date), in an action wherein the plaintiff was a party and the other beneficiaries and the executors. It was then held that the land devised to the son William was charged with the payment of \$200 per year for five years after the death of the testator, towards satisfaction of the legacies—including that of the plaintiff. These payments for the five years have been made, and the executors have administered the personalty and turned over the other land devised to Charles to him in 1891, which was charged with an annuity for the life of the widow as a first charge and as a second charge any unpaid balance remaining due on the legacies. That act of transfer concluded the duties of the executors, and thenceforth the devisee Charles took the land subject to the lien for legacies. This lien was, by the terms of the will, exigible at the end of the five years from the testator's death, so far as the balance then unpaid was concerned. The land might have been resorted to subject to the lien of the widow, and sold, but this course was not taken—it may be because it was considered that the land would not realize sufficient to pay anything on the legacies if sold subject to the widow's annuity. But of this there is no explanation in the evidence, and all that appears is, that from 1894, when the five years expired, until the issue of the writ in October, 1907, nothing has been done to relieve the plaintiff from the bar imposed on this action to recover the legacy charged on the land, which arose at the end of ten years, from 1894.

I see no other way in which the legal effect of the whole transaction can be viewed, and I see no way in which any case of express trust can be raised as against the executors or the other defendant.

Costs were given below. I would not think it a case for costs of this appeal as against Charles, who holds his land exempt from the payment of \$600, which the testator intended should be made. The executors should get costs of appeal.

HON. MR. JUSTICE LATCHFORD and HON. MR. JUSTICE MIDDLETON agreed.

DIVISIONAL COURT.

FEBRUARY 8TH, 1912.

CANADIAN BANK OF COMMERCE v. GILLIS.

3 O. W. N. 646.

Promissory Note—Given in Payment of Shares—In Foreign Company — Not Licensed to do Business in Ontario — Endorsed to Bank—Holder in Due Course—Defence—Fraud and Misrepresentation—Notice—Taking Subject to Equities between Maker and Company.

DIVISIONAL COURT affirmed judgment of BRITTON, J., 20 O. W. R. 622.

An appeal by the plaintiffs from a judgment of HON. MR. JUSTICE BRITTON, 20 O. W. R. 622.

The appeal to Divisional Court was head by HON. SIR JOHN BOYD, C., HON. MR. JUSTICE LATCHFORD, and HON. MR. JUSTICE MIDDLETON.

Glyn Osler, for the plaintiffs, appellants.

J. C. Makins, K.C., for the defendant, respondent.

HON. SIR JOHN BOYD, C.:—The note sued on was taken by the Snow Plough Company, upon the condition, written upon the back of the note, that it was to be held by Lett, the secretary of the company till it was due. In breach of this, it was hypothecated to the plaintiffs' bank, who must be affected with notice of the condition written upon the note; so that the position of the bank is that of holding the note subject to all the equities that might attach to it if taken when overdue. The position of the plaintiffs is, therefore, not superior to that of the payee, and upon the evidence it is clear that the note was obtained from the maker by means of a series of fraudulent misrepresentations of material matters, which effectually vitiated the transaction as between the original parties to the note. It would be a futile attempt of the Snow Plough Company to seek the intervention of a Court to enforce payment from the deceived person, and the bank occupies, in the circumstances, no superior position; so that I would entirely agree in the judgment in appeal. It should be affirmed with costs.

The foreign company licensed to do business in Ontario has not the same name as the company to whom this note was given, but it is not necessary to deal with the possible effect of that upon this transaction, taking the view we do of this appeal.

DIVISIONAL COURT.

FEBRUARY 12TH, 1912.

SWALE v. CANADIAN PACIFIC R.R. CO.

3 O. W. N. 633, 664.

Third Party—Notice Served Ex parte—Third Party should have Full Discovery from Both Plaintiff and Defendant—Con. Rule 209.

MASTER IN CHAMBERS, 20 O. W. R. 997, set aside an *ex parte* order, allowing the defendants to serve a third party notice and the notice served pursuant to said order. Costs to plaintiff and third party forthwith after taxation.

RIDDELL, J., *held* that as the plaintiff had not objected to the third party proceeding and as no possible harm could accrue to anyone from allowing the third party notice to be served, such notice should be allowed.

Parent v. Cook, 2 O. L. R. 709, 3 O. L. R. 350, distinguished.

DIVISIONAL COURT affirmed judgment of RIDDELL, J. Order of Master in Chambers set aside.

An appeal by Suckling & Co., third parties, from a judgment of HON. MR. JUSTICE RIDDELL, on appeal from an order of the Master in Chambers, 20 O. W. R. 997, setting aside an *ex parte* order, allowing the defendants to serve a third party notice and the notice served pursuant to said order.

Shirley Denison, for the defendants.

Wm. Laidlaw, K.C., for the third party.

HON. MR. JUSTICE RIDDELL (1st February, 1912):—
The plaintiff claims that she in 1908, delivered to the defendants in Liverpool, England, 97 cases of settlers' effects for Toronto, that they arrived at Toronto, June, 1908, and she was duly notified of such arrival by the railway company—that by delay occasioned by an interpleader, she was prevented from taking delivery till March, 1909, when an order was made putting an end to the interpleader proceedings—that thereafter the defendants retained the goods till October 21st, when they proceeded

to advertise ninety of them—and that a portion of these were sold, realizing \$1,700. She further alleges that no proper account was kept of the sale, and in many instances the amounts accounted for are too small—also that while the goods were in the custody of the defendants, they were opened and unpacked and a large quantity converted by the defendants to their own use—and the statement concludes:—

“11. . . . By reason of the conversion by the defendant company of a large portion of the said goods and effects and its improper and wrongful accounting in regard to the sale of such portion of them were sold as afore-said, the plaintiff has suffered damages to a large amount, to wit, to the sum of about \$1,500 and she claims:—

“1. That she is entitled to a proper account of the goods sold by the defendant company.

2. That she is entitled to be paid the full value of the said goods converted by the defendant company, its servants, workmen and agents.

3. Or for damages for the conversion of the said goods referred to in the said statement of claim.

4. The costs of this action.”

Upon the material and statements and admissions before me, it appears that the goods reached Toronto in July, 1908, that notice was given to the plaintiff of their arrival, but that she neglected to remove them—that it was in October that the claim was made resulting in interpleader proceedings, and that the claim adverse to the plaintiff was disposed of in her favour by Mr. Justice Anglin in February, 1909. Then in October the railway company put the goods into the hands of Suckling & Co., auctioneers, to sell to pay the charges they had against the goods—the auctioners received all the goods the shipping bill called for, and they sold October 21st what they did sell for less than enough to pay the charges of the railway company. Some of the goods, however, the auctioneers delivered both before and after the sale to the husband of the plaintiff, her agent. The auctioneer so delivered some goods before the sale “at the solicitation of an intimate friend,” and, it is said, upon an undertaking that the goods would be accounted for—and after they had sold what they thought was sufficient to cover the C. P. R.’s claim, they delivered the remainder to the husband.

Action was brought February 1st, 1910, statement of claim, March 21st, 1910—and statement of defence and counterclaim, April 8th, 1910. This pleading sets up the arrival and notice, neglect of plaintiff to remove the goods, interpleader and termination thereof, further neglect by plaintiff to remove, sale by defendants, October 21st, 1909, realizing \$1,480.63, the charges against the goods being \$1,657.79, notification to plaintiff of time and place of sale and attendance thereat by the plaintiff or her agent without objection, and purchase by the plaintiff or her agent of some of the goods—account furnished in detail, and balance still due of \$177.16. The defendants claimed a dismissal of the action and judgment for \$177.16 and interest, etc. No further pleading was filed except a formal joinder by plaintiff, April 21st, 1910.

The record was passed February 8th, 1911; on March 10th, a notice of motion for a commission to examine witnesses in England, was served by the defendants, and March 13th, Mr. Justice Britton, upon application of the defendants in the trial Court, made an order for commission to England, and ordered the case to be put at the foot of the list, but to be expedited, the defendants to pay the costs of plaintiff for the two days she attended. The order was not taken out, but in May, the defendants moved for particulars. The case came on again for trial, when Mr. Justice Middleton, September 16th, 1911, directed it to stand off the list, but to be entered again when ready for trial. September 12th, the solicitor for the defendants made an affidavit that he had but a short time before learned that the plaintiff or her agent had removed some of the goods, and served notice of motion for leave to amend his pleadings, for better particulars of claim and further examination of the plaintiff and her husband—this was opposed, but the Master in Chambers, September 25th, made an order for amending pleadings and examination of plaintiff's husband enlarging the motion in respect of the other matter. December 4th, 1911, the defendants obtained an ex parte order to serve third party notice on the auctioneers—some correspondence took place between the solicitors for the defendants and the auctioneers, and at length these moved to discharge the order last mentioned. January 19th, 1912, the Master in Chambers set aside the third party order, and the defendants now appeal. The order for commission has been taken out and conduct

thereof assumed by the plaintiff—and the commission has not been executed. The plaintiff has not objected and does not object to the third party proceeding.

In support of the order appealed from it was urged that the contract of the defendants was that of insurers and consequently entirely different from any contract express or implied between the defendants and the auctioneers. Supposing that such a difference would prevent the proper service of a third party notice (which I do not at all think) it is plain from all the material and from what took place before me that the claim of the plaintiff is not against the railway company as common carriers and consequently insurers, but as warehousemen. The plaintiff says in effect to the defendants: you had my goods you had the right to sell them, but it was your duty to keep the goods safe, to open the boxes, etc., with care, to advertise properly, to sell prudently, to keep and render an accurate account of your sales and to pay to me the balance of the proceeds over and above your claim. You did not do that. Your servants took some of the goods; you unpacked the goods, you made no proper inventory so that a proper sale could be had. you did not keep and render a proper account of the sale." The defendants say: "We think we did all we were called upon to do," and now they desire to say further, "but if we are in default, it is because the persons whom we entrusted to act for us the auctioneers have not done as they should: they owed us the same duty which we owed to you—it was they who opened the goods, they who sold, they who kept account and if we are liable to you it was entirely their fault, and they are liable to us for precisely that sum."

It seems to me impossible to conceive of a case in which our C. R. 209 is more to the point, and I do not think the cases prevent its application.

In *Smith v. Matthews* (1907), 9 O. W. R. 62, I held that where agents by buying had rendered the principle liable to the plaintiff there was a contract on their part to indemnify the principal against what he had to pay the agents not delivering the goods. See this case before the Master-in-Chambers in (1906), 7 O. W. R. 598. I can see no difference between an agent buying and one selling.

Nor are the cases adverse to this view.

Payne v. Coughell (1895), 17 P. R. 39, was under the old rule 1313, which did not contain the words "or any other relief."

In 1881 by the Judicature Act O. XII. R. 19: R. 107, the rule was substantially as it is now; this was the same in the revision of 1888, R. 328, but C. R. 1313, June 23rd, 1894, amended the rule by leaving out "or any other remedy or relief," and the present rule reinstating such words came in force September 1st, 1897.

In *Payne v. Coughell*, the rule was as in England and it was held, following the English cases, that the claim of the defendants, if it be but a claim for damages arising from breach of contract, is not a "claim to indemnity"—but after the change in 1897 of the rule in *Confederation Life Assoc. v. Labatt*, No. 2 (1898), 18 P. R. 266, it was held that a claim based upon the implied warranty of title on the sale of goods was a claim which could come under the words "any other relief over" in R. 209. Both Meredith, J., and the Divisional Court point out that the Rule has been changed.

In *Wilson v. Boulter* (1898), 18 P. R. 107, the Chancellor pointed out that "the object of the enactment is to prevent the same questions common as between all three (plaintiff and defendant and third party) from being tried on different occasions and in different forums," p. 109. And where an action in tort had been brought against the defendants for damages occasioned by a defective piece of apparatus, he set aside a third party notice served upon the makers of the apparatus who had given no warranty. The learned Judge points out that the damages for the plaintiff against the defendant and those of the defendant against the third party would be awarded on quite different principles.

In *Windsor, &c. Assn. v. Highland, &c. Club* (1900), 19 P. R. 130, the plaintiffs claimed for rent of a race-track, the defendants claimed that a ferry company had agreed with the plaintiffs to pay and contribute so much per day toward this rent, and that the defendants thereby were induced to enter into the agreement with the plaintiffs—and served the ferry company with third party notice. In the Divisional Court it was pointed out that this could not be "indemnity" as there was no contract express or implied between the defendants and the third parties—nor was it "contribution" which arises when two or more persons are subject to a common liability other than fraud or a wilful tort; and that no "other relief over" could exist as the defendants had and could have no cause of action

against the third parties, having no contract with them. Leave to appeal was refused.

In the much canvassed case of *Parent v. Cook* (1901), 2 O. L. R. 709; 3 O. L. R. 350, the plaintiff sued the defendants for trespass to land and cutting down and removing timber, the defendants served third party notice on those who had sold them the timber. This was set aside as being too late. Meredith, C.J., considered it unnecessary to express an opinion whether the case came within the rule though the inclination of his mind was against it, "for, assuming that it is, in my opinion nothing would be gained by bringing in the appellants as third parties. . . . The measure of damages in the one case might be . . . very different from that in the other. . . ." In the Divisional Court, Street, J., said: "There was no common question to be tried and the damages here are not merely the same damages that might be proved in another action." While Britton, J., expressed no opinion on the agreement.

In *Langley v. Law Society U. C.* (1902), 3 O. L. R. 245, the plaintiff sued for the amount of a book debt assigned to him and added the assignor—the assignor claiming that he was merely the agent of a bank was allowed to serve third party notice on the bank following *Confederation Life Assoc. v. Labatt* (1898), 18 P. R. 266. This is the converse of *Smith v. Matthews*, and in another manner the converse of this case.

Miller v. Sarnia, &c. Co. (1900), 2 O. L. R. 546, the plaintiff sued the gas company for damages for escape of gas from their pipes—the company claimed that the escape was caused by the negligence of the town in constructing a sewer. The Court, Street, J., said, p. 548: "The third party procedure is only applicable where the defendant is, if liable to the plaintiff, entitled to recover against the third party the very damages which the plaintiff seeks to recover against him. Here . . . the damages which may be recovered by the plaintiff against the defendants are not the measure of the damages, if any, which may be recovered by the defendants against the third parties for the alleged tort of the third parties."

Gagne v. Rainy River (1910), 20 O. L. R. 433, is much such another case. The plaintiff sued for damages because his ferry business was interfered with by the defendants' logs—the defendants claimed that the third party had built a dam in such a way as to impede their drive. Mr. Justice

Teetzel thought that the third party notice could not stand on two grounds: 1, that the rule 209 applies only to a right to relief given by law in consequence of a breach of contract express or implied between defendant and the third party or is a right given by statute, and 2, the damages recoverable by the plaintiff was not the measure of damages the defendants could recover from the third party. See also *Wade v. Pakenham* (1903), 2 O. W. R. 1183.

I am convinced that the Consolidated Rule has been given quite too narrow an application, and hope that the matter may receive full consideration in an appellate Court. But taking the tests laid down by my brother Teetzel—in the present case there is the implied contract of the auctioneers with the defendants—and the damages recovered by the plaintiff, if any, from the railway company are the measure of damages recoverable by the C. P. R. from the auctioneers, their agents. See also *London, etc. v. Loscombe*, 13 O. L. R. 8 O. W. R.; *Budd v. Dixon* (1907), 9 O. W. R. 371.

Applying the test in *Wilson v. Boulter*, it would be unfortunate if the damages on the two contracts should be assessed by two tribunals. See *Benocke v. Frost*, 1 Q. B. D. 422; *Re Collie*, 2 Ch. D. 51.

I have not considered the English cases as binding (being upon a rule differently worded), though I have read those cited and several others.

Then as to time, the notice should have been served (C. R. 209) "within the time limited for the service of . . . defence." Power exists in the Court to extend this time (C. R. 353), and the time should be extended if a proper case is made out for such extension.

The reason advanced for such extension is that it was only recently that the defendants were aware that the auctioneers had had dealings with the plaintiff behind their back. This is to me no reason whatever. The statement is that the auctioneers without the knowledge of the railway company allowed the plaintiff to take away certain of the goods entrusted to them to sell. This conduct if it resulted in loss to the C. P. R. e.g., if it prevented the full amount of the charges being obtained, no doubt gives a cause of action to the C. P. R.—no doubt the C. P. R. could sue both the auctioneers and the plaintiff for taking these goods—and could have counterclaimed in this action. But the liability on the implied contract to sell with care, etc., etc., was thor-

oughly known to the defendants from the beginning of the action. This conduct of the agents said to be recently discovered, in no way increases the liability of the C. P. R. to the plaintiff—but rather the reverse, for the plaintiff cannot make any valid complaint against the railway in respect of the goods she herself took from the custody of their agent.

I think then that I must consider the case as though no such discovery had been alleged.

I agree, however, sub modo with what is said by the learned Master in *Ontario Sugar Co. v. McKinnon* (1904), 3 O. W. R. 64: “the limitation imposed by Rule 209 was not intended for any other purpose than to prevent unreasonable delay to the prejudice of the plaintiff.” The case must be rare, where anyone but the plaintiff can be injured by the delay, and most of the cases have been cases in which he moved to set aside the third party notice, sometimes indeed the third party joining.

In *Associated, etc. Cos. v. Whichcord* (1878), 8 Ch. D. 457, 38 L. T. N. S. 602, and *Birmingham, etc. v. L. & N. W. R. Co.* (1887), 56 L. T. N. S. 702, it was the plaintiff who moved, and in *Molsons Bank v. Sawyer* (referred to in *Ontario Sugar Co. v. McKinnon*), Mr. Winchester, M.C., would not give effect to an objection by the third party nor did Mr. Cartwright, M.C., in *Stuart v. Hamilton Jockey Club* (1911), 17 O. W. R. 403. It is true that it was the third party who objected in *Parent v. Cook*, but the time was not enlarged in that case, because as the learned Chief Justice said: “the case is not in my opinion one in which I should in the exercise of my discretion, enlarge the time allowed by the rule for serving the notice. It is probable that the only question which would be determined at the trial, as well between the respondents and appellants as between the former, and the plaintiff would be whether or not the acts complained of were unlawful or were lawfully done under the authority which the respondents plead as their justification. The measure of damages in the one case might be . . . very different from that in the other.”

In the Divisional Court, as we have seen, one of the learned Judges thought that it was not a case for a third party notice at all. This is no authority for saying, that where the plaintiff does not object and the case is clearly one for a claim over, the time is not to be extended for serving the notice in a proper case.

In the present case, as I have said, it seems to me that it would be unfortunate if there were to be two trials by different tribunals of the same questions; and as no possible harm can accrue to anyone from allowing the third party notice to be served, such service should be allowed.

The defendant might also, if so advised, have counter-claimed from the auctioneers along with the plaintiff for damages for the unauthorized interference with the goods, the property of the defendants; but as such an amendment is not asked, I do not make an order in that sense.

The defendant will pay the costs of the motion before the Master in any event; and there will be no costs of this appeal.

The appeal by Suckling & Co., third parties, from above judgment, to Divisional Court, was heard by HON. SIR JOHN BOYD, C., HON. MR. JUSTICE LATCHFORD, and HON. MR. JUSTICE MIDDLETON.

W. Laidlaw, K.C., for appellant and third parties.

Shirley Denison, K.C., for the defendants.

W. H. Hall, for the plaintiff.

HON. SIR JOHN BOYD, C. (12th February, 1912) :—The more important part of this case (if not the whole of it), will turn upon what was done with the goods after they reached the hands of the Canadian Pacific Railway Company at the end of their carriage to this country. The goods remained in the hands of the company till turned over to be sold by the auctioneer Suckling, to above custody and sale-rooms the goods were transferred in bulk. The packages or cases were then opened, and the goods disposed of in a manner which is challenged by the plaintiff. As to this part of the controversy, which appears to be the substantial part, the Canadian Pacific Railway Company claim to be indemnified by or to have relief over against the proposed third party, Suckling. The wrongdoing of Suckling, if any, would be charged upon the railway company by the plaintiff; and the company should clearly have the right of resort to the wrongdoer. This may well be accomplished in one and the same action, in which the plaintiff's claim is being prosecuted against the company. The same evidence that establishes

the claim against the company will establish it against the auctioneer, on this part of the case; no delay or inconvenience can arise in dealing with the whole case so prosecuted with the addition of the third party; and the plaintiff makes no objection to the application. The liberal provisions of Rule 209, should be construed with a view to practical efficiency rather than to scientific accuracy; and I see no reason to disagree with the carefully considered judgment of my brother Riddell.

This to be affirmed with costs in the cause to the plaintiff and defendants the company as against the third party.

HON. MR. JUSTICE LATCHFORD, I agree.

HON. MR. JUSTICE MIDDLETON:—The right to invoke the third party procedure exists whenever the plaintiff's claim against the defendant, if successful, will result in the defendant having a claim against the third party to recover from him the damages which he has been compelled to pay to the plaintiff.

It is not enough for the defendant to shew that, if the plaintiff establishes his case, he, the defendant, will, on the facts so established, have some cause of action against the third party. He must do more than this—he must shew that he has a right “to indemnity or relief over,” in respect of the plaintiff's recovery against him.

At one time we had a Rule (328 of the revision of 1888), empowering the addition of a person as party where it appeared that any question in the action ought to be determined so as to bind such party. This has now been repealed, and this principle cannot be applied; but the Rules as they remain are remedial, and should be freely applied to cases falling fairly within them.

There is no foundation for the suggestion sometimes made that the right of indemnity must be for the whole of the plaintiff's claim—it is enough if that right exists for any separate or separable part of the plaintiff's claim. Nor need this measure the full extent of the defendant's claim against the third party—it is enough if he can claim, *inter alia*, indemnity in respect of the plaintiff's recovery.

I adhere to what I said in *Pettigrew v. Grand Trunk R. Co.*, 22 O. L. R. 23, as to the way in which applications to set aside third party notices should be dealt with. The real

question should be left to the trial; and such applications should form no exception to the general rule that the rights of the parties should not be disposed of on summary applications.

I would dismiss the appeal with costs to be paid by the appellants to the plaintiff and the defendants, and in any event of the cause.

Appeal dismissed.

MASTER IN CHAMBERS.

FEBRUARY 9TH, 1912.

BRODIE v. PATTERSON.

3 O. W. N. 685.

Mortgage—Redemption—Extension of Time for—To Arrange New Loan or Effect a Sale—Island in Lake Superior—Terms.

MASTER IN CHAMBERS granted order extending time for redemption until 9th March, 1912. Interest allowed at 5 per cent. Costs fixed at \$20.

Motion by the owner of the equity of redemption in certain islands in Lake Superior valued by him at \$50,000, to extend the time for redemption until 9th March next, with a view to enable him to redeem by a fresh loan or a sale.

The report finds \$12,125.31 to be due.

J. B. Clarke, K.C., for the motion.

J. J. MacLennan, shewed cause.

CARTWRIGHT, K.C. MASTER:—A similar motion was successfully made not only once but three times in the case of *Imperial Trusts Co. v. N. Y. Securities Co.*, 9 O. W. R. 98-730. So too in the case of *Mitchell v. Kowalsky*, 14 O. W. R. 792. In this latter instance the time was extended until 4th February, 1910, and again on that date to 14th March. Then as in the *Imperial Trusts* case the mortgage was paid off. The mortgagees in each case got their money with all proper and just allowances and costs, and the mortgagors either received a substantial balance as in the first case or recovered the property as in the other.

The only question therefore, is, on what terms should the reasonable request of the mortgagor be granted?

Here the facts as stated on the argument are more favourable to this application than were those of the two reported cases. The mortgage here is not of such long standing as that of the Imperial Trusts Co., and it has been reduced (I think by nearly one-half) by the liquidation of a collateral security.

I therefore extend the time as asked. Interest must be paid at the rate of 5 per cent. upon the aggregate amount fixed in the report which will be settled and inserted in the order. To this will be added the costs of this motion fixed at \$20, making a total of \$12,200.

DIVISIONAL COURT.

FEBRUARY 10TH, 1912.

SMITH v. GRAND TRUNK R.W. CO.

3 O. W. N. 659.

Negligence — Railway — Engineer Killed — Action by Widow for Damages—Deceased Knew Semaphore was up—Responsibility of Conductor.

An action by Jean Smith, widow and administratrix of Charles Franklin Smith, a locomotive engineer in defendants' employment, who was killed on 20th July, 1911, by his engine going through an open bridge over the Welland Canal and carrying him to his death, to recover unstated damages.

BRITTON, J., 20 O. W. R. 654:—On the evidence and the fourth answer of the jury, and inasmuch as the deceased knew that the semaphore was up and not lowered for the train of deceased, he must be held equally responsible with the conductor, and I would dismiss the action, but without costs.

DIVISIONAL COURT reversed above decision and entered judgment for plaintiff for \$1,800 and costs of action and appeal, holding that it was the engineer's duty to obey orders of conductor, and that the jury had found he rightly did.

An appeal by the plaintiff from a judgment of HON. MR. JUSTICE BRITTON, 20 O. W. R. 654.

The appeal to Divisional Court was heard by HON. SIR JOHN BOYD, C., HON. MR. JUSTICE LATCHFORD and HON. MR. JUSTICE MIDDLETON.

J. R. Logan, for the plaintiff, appellant.

W. E. Foster, for the defendants, respondents.

HON. SIR JOHN BOYD, C.:—Upon the answers given by the jury, I would direct a verdict to be entered for the plaintiff for the damages assessed at \$1,800.

The first answer declares that the engineer (represented by the plaintiff) lost his life by the negligence of the conductor of the train, and the details are given in the second answer, that the conductor should have signalled the engineer to back up the train again (i.e., from the water-tank, to which point the engineer had taken the train) until the semaphore (which the engineer had passed) was lowered.

They next find that the engineer was guilty of contributory negligence because of his passing the semaphore without permission. But this last finding was clearly wrongly styled contributory negligence. It was a primary act of negligence which had expended itself when the forepart of the train reached and stopped at the water-tank. There came an interval of several minutes when the train was at a stand-still. Next and finally the train was set in motion by the engineer, in response to the conductor's signal to go ahead, when he saw that the semaphore was against him. The engineer had signalled the conductor that he was all ready (i.e., that sufficient water had been taken) and thereupon came the conductor's signal to go ahead, which he obeyed to his own destruction. But the jury have exculpated him from blame in so going forward, and have put all the responsibility for that act on the conductor.

I think the learned Judge erred in applying the company's rule 22 as absolutely fixing equal responsibility on the two officers, conductor and engineer. This involves finding that the engineer should have seen the danger and refused to obey the signal to go: but this aspect of the case was laid before the jury, and they have found that the engineer acted reasonably and with proper precaution when he saw the green lights of the bridge (which indicated all was right to go across) and then went ahead after the signal from the rear given by the conductor. The duty of the engineer is to obey the orders of the conductor; and this the jury find that the engineer rightly did at the critical moment, and thus in effect find that he did not violate the terms of the rule of the company. It cannot be said that this finding is contrary to the evidence; and, therefore, I do not think the strict letter of the rule can be invoked to neutralise the decision of the jury on the facts. The

duty of the engineer is to obey the orders of the conductor; and this, the jury find, he rightly did.

The appeal should be allowed and judgment entered for \$1,800 with costs of action and of appeal.

HON. MR. JUSTICE LATCHFORD and HON. MR. JUSTICE MIDDLETON concurred.

HON. MR. JUSTICE RIDDELL.

FEBRUARY 12TH, 1912.

RE ATKINS.

3 O. W. N. 665.

Will—Construction—Motion for by Executors under Con. Rule 938—Wills Act, s. 26 (1)—Will Speaking from Death—Legacies Payable out of Specific Fund which was Destroyed During Testator's Life—Direction to Sell Lands and Divide Proceeds among Named Persons—Land Sold During Testator's Life—Administration of Estate—Debts and Costs Payable out of Particular Fund—Costs of all Parties out of Estate.

Motion by the executors under Con. Rule 938 for an order construing the will of the late William E. Atkins.

J. Grayson, Smith, for the executors.

R. C. H. Cassels, M. C. Cameron and A. G. MacKay, K.C., for several legatees.

HON. MR. JUSTICE RIDDELL:—The testator made his will June 10th, 1902, wherein after appointing executors he made the following dispositions.

I leave Robert Ernest Seaman the sum of four hundred dollars, to come from the amount deposited in the Molsons Bank. The balance in the Molsons Bank after paying funeral expenses and a stone to mark my grave, not to cost over \$20, to be divided equally between Martha Wright, Alice Weaver and Robert Neeland's four children. The expenses in connection with the payment of this part of the estate to come from the same, viz., that amount in the Molsons Bank account.

To my relatives in England I leave one thousand dollars in equal shares to the following persons, viz.: Eli Atkins, my brother, Emma Bunce and William Atkins eldest son of John Atkins, my deceased brother, and if Eli Atkins be

not living then his share to go to the invalid daughter now living with Eli Atkins her father, these amounts to come from the savings bank account together with any expenses in this connection with this division.

I direct that my Meaford real property be sold and divided (after the expenses of the sale be taken out and after a wise and judicious sale can be effected) equally between Tilly Short, wife of W. J. Short, Seymour Bumstead and William Edwin Bumstead, sons of Charles Bumstead and Mrs. William Ufland. The time of the sale of this property to be in the discretion of the executors so as to effect an advantageous sale of the same. The expenses of selling and the division of this property to come out of this part of the estate. It will seem that there is no residuary clause.

At the time of making his will he had:—

1. In the Molsons Bank, Meaford \$ 639 58
2. In the P.O. Savings Bank Dept. 1,103 19
3. A note of one R. C. T. and interest .. 100 00
4. Lots 61 & 62 W. side Bayfield St.,
Meaford.

In June and July, 1905, the account in the P.O. Savings Bank was closed out and apparently the money was deposited in the Molsons Bank account. No further sum was deposited in the P.O. Savings Bank.

On October 3rd, 1903, the Meaford lots were sold for \$925, and a mortgage taken in June, 1907, for \$500 part of the purchase money.

In March, 1907, the testator transferred into the joint names and himself and one of the persons he had named as executor, the money then to his credit in the Molsons Bank. At the time of the death of the testator in January, 1911, the whole of the testator's property was as follows:—

1. In Molsons Bank to the joint account
spoken of \$2,394 80
2. Mortgage on which there was due and
interest 367 10
3. Note of R. C. T. and interest 100 00

It seems, although it is not and perhaps cannot be proved, that the proceeds of the Meaford lots except so far as they are represented by the mortgage were used by the testator for his support.

It is quite plain that the testator when he made his will intended that the \$1,000 mentioned in clause 3 should be

paid out of the \$1,103.19 then to his credit in the P.O. Savings Bank, and that he did not intend any of the money then in the P.O. Savings Bank to go to the legatees named in clause 2. But he himself destroyed the fund in the P.O. Savings Bank and deposited it in the Molsons Bank. It is claimed then that those named in clause 2 should receive the benefit and that all the money in the Molsons Bank should go to them. (There is no question as to Robert Ernest Seaman—he gets his \$400—nor as to the expenses of this fund).

The Wills Act, 1897, R. S. O. ch. 128, sec. 26 (1) provides: "Every will shall be construed with reference to the real and personal estate comprised in it to speak and to take effect as if it had been executed immediately before the death of the testator unless a contrary intention appears by the will." There is nothing in this will indicating any such contrary intention, the testator retained the power of increasing or diminishing the amount on deposit and must be taken to have understood that it was the fund so increased or diminished upon which this clause of his will would take effect. There is nothing to indicate that he did not when he destroyed the fund intend to play a sorry jest upon the persons named in this clause, if the destruction of the fund should have that effect.

And in like manner the Molsons Bank deposit be retained the power to increase or diminish; and there is nothing to indicate that he did not intend the fund so increased or diminished to be divided among those named in clause 2 or that these should not have the benefit of the increase actually made. Paraphrasing the words of the Master of the Rolls in *Bothamley v. Sherson* (1875), L. R. 20 Eq. 304 at pp. 312-3 "the balance in the Molsons Bank" does not mean "the balance in the Molsons Bank at the time of my making this will" but "the balance in the Molsons Bank at the time of my death: *Goodlad v. Burnett* (1855), 1 K. & J. 341; *In re Holden* (1903), 5 O. L. R. 156; *Re Dodds* (1901), 1 O. L. R. 7.

Then as to the land and clause 4 of the will.

It was decided as long ago as 1784 by Lord Thurlow, L.C., in *Arnald v. Arnald*, 1 Bro. C. C. 401 (S. C. sub nom. *Arnold v. Arnold*, 2 Dick. 645), that where a testatrix orders her estate to be sold and the proceeds to be divided, and afterwards she sells the estate this is a revocation of the will. In that case the testatrix left a will whereby she

devised a messuage in Lancashire to C. for life and after C.'s death to C. H. and W. A. to sell the same and apply £200 to the use of M. C. A.; one-third the residue to the use of C. A.; one-third to the use of W. A., and the interest of the other third to E. T. for life remainder to E. T.'s children. The testatrix after the making of the will sold the estate for £2,500, a part of the purchase money was left upon mortgage on the messuage and the remainder invested in consol. annuities. The Lord Chancellor held that "the alteration was an ademption," "there is an absolute disposition made by the will, and before that can take effect, another absolute disposition inconsistent with it is made by the testatrix herself." 1 Bro. C. C. at p. 403, (the life tenant had apparently died during the lifetime of the testatrix; and the plaintiff was one of those entitled under the will to a part of the proceeds of the sale of the estate.

"It is clear that the money arising from the real estate devised by the testatrix and afterwards sold by her made part of her general estate:" 2 Dick. at p. 646. The same rule prevails even though the land be not conveyed during the lifetime of the testator so long as a contract for sale exists: *Farrad v. Winterton* (1842), 5 Beav. 1.

In re Bagot's Settlement (1862), 31 L. J. Ch. N. S. 772, and where even on the day following the sale the land is reconveyed to the testator by way of mortgage for securing part of the purchase money: *In re Clowes* (1893), 1 Ch. 214.

Our own case of *Re Dodds* (1901), 1 O. L. R. 7, is also in point. The provisions, then, of clause 4 are wholly nugatory.

The bequest in clause 3 is what is called in the civil law—and the terminology has been adopted by our Courts of Equity—a demonstrative legacy, i.e., one which is a legacy of quantity in the nature of a specific legacy as or so much money with reference to a particular fund for payment. In this case if the fund be called in (as in the present case) or fail the legatee will not be deprived of his legacy but be permitted to receive it out of the general assets: *Fowler v. Willoughby*, 2 Sim. & Stu. 358; *Creed v. Creed*, 11 Cl. & F. 491, 509; *Tempest v. Tempest*, 7 D. M. & G. 470, 473. Therefore the legatees in clause 3 are entitled to look to the assets other than the money in Molsons Bank and to receive so much as these assets can be made to realise.

The testator clearly was ignorant of the method of administering estate—an ignorance not uncommon amongst laymen. His intention, however, may be carried out by

1. Pay out of Molsons Bank fund the debts and for the stone not more than \$20.

2. Make a statement of all the costs of administration including Surrogate Court, the costs of this motion, executors' commission, etc., etc.

3. Divide this total pro rata between the balance of the Molsons Bank fund and the remainder of the estate.

Costs of all parties out of the estate, those of executors as between solicitor and client. I declined to dispose of the matter without hearing what could be urged by counsel for the beneficiaries under clause 4 and dispensed with his appearance in person accepting a written statement in lieu of this. He frankly says that he cannot find authority for contending that his client has any right, but counsel who says as much assists the Court quite as much as one who advances arguments which are unsound. I think he may be allowed a fee upon taxation out of the estate.

HON. MR. JUSTICE SUTHERLAND. FEBRUARY 10TH, 1912.

WEBER v. BOWMAN.

3 O. W. N. 686.

*Water and Watercourses — Obstruction of Stream by Mill Dam—
Flooding Farmer's Lands—Action for Damages and Injunction
—Costs.*

SUTHERLAND, J., granted injunction restraining defendant from overflowing plaintiff's lands, and awarded plaintiff \$25 damages subject to a reference. Plaintiff given costs on County Court scale, without right of set-off to defendant.

Plaintiff, a farmer, brought action against defendant, a miller, to recover damages for the obstruction of the waters of a stream flowing through the plaintiff's lands, and for an injunction restraining defendant from causing further overflow.

A. B. McBride, for the plaintiff.

W. M. Cram, for the defendant.

HON. MR. JUSTICE SUTHERLAND, delivered a copious judgment setting out the facts, evidence and proceedings at the trial, wherein he held that the dam constructed by the defendant in 1911 was higher than either of the former dams which had existed at or near the locus of the defendant's present dam. That the plaintiff's lands had, since the erection of the present dam by the defendant, and in consequence of its being higher than the former ones, been subjected to a greater quantity of water than would have come there naturally, and that, in consequence thereof the plaintiff had suffered damage, but the damage was confined to some seven or eight acres valued at about \$6 per acre.

Plaintiff given judgment for an injunction restraining the defendant from obstructing the flow of the stream to such an extent as to overflow the plaintiff's lands above mentioned, and for damages assessed at \$25 subject to a reference, if either party objected to that amount; in which case the costs of the reference should be in the discretion of the Master.

Plaintiff given costs of the action on County Court scale without any right of set-off to the defendant.

DIVISIONAL COURT.

FEBRUARY 12TH, 1912.

RICHARDS v. CARNEGIE.

3 O. W. N. 686.

Trespass to Lands—Damages—Right to Possession—Question between Landlord and Tenant—Whole Claim of Trumpery Kind—Nothing to go to Jury—Action Dismissed—Affirmed by D. C.

An appeal by the plaintiff from a judgment of Bruce County Court dismissing an action for damages for trespass alleged to have been committed by the defendant upon the lands demised to the plaintiff.

The appeal to Divisional Court was heard by HON. SIR JOHN BOYD, C., HON. MR. JUSTICE LATCHFORD and HON. MR. JUSTICE MIDDLETON.

G. H. Kilmer, K.C., for the plaintiff, appellant.

O. E. Klein, for the defendant, respondent.

HON. SIR JOHN BOYD, C.:—Having read the evidence, I think the Judge made a right disposition of the case by dismissing it. The whole claim is of a trumpery kind, at most being for some possible damages that the plaintiff might have sustained by not engaging in gathering ashes to put in an ash-heap on the premises for 13 days. There is no evidence that there were any ashes to be gathered during that time, or that the plaintiff could have got any ashes.

Then his case fails as to his being legally in possession of the land. There is no evidence of a yearly holding. Johnson, who let him on at first, had no authority to act for the owner; but, being in charge of the place to make a sale of it, he allowed the plaintiff, out of compassion, to gather ashes on it for one year at \$5. When this was told to the owner, he objected, and said that the plaintiff must be ordered to leave. This was in the summer of 1910, and after the expiry of the year. The plaintiff, however, kept on till the end of September, and then paid rent for the extra few months and took a receipt on the 28th September, expressed to be for rent up to the 30th September, 1910. Carnegie, by his act in his receiving the money, validated that extent of holding, no doubt; but what was done was against his wish and cannot be carried beyond the very letter of what was done.

There was nothing to go to the jury at the close of the plaintiff's case, and it certainly was not strengthened by the defence.

The appeal should be dismissed with costs.

HON. MR. JUSTICE LATCHFORD and HON. MR. JUSTICE MIDDLETON concurred.

MASTER IN CHAMBERS.

FEBRUARY 13TH, 1912.

HARRISON v. KNOWLES.

3 O. W. N. 688.

Costs—Præcipe Order for Security—Motion to Set Aside—Grounds, Plaintiff had Adequate Assets in the Jurisdiction—Promissory Notes Given for Lithographing Press—Notes Overdue—Not Satisfactory Assets—Motion Dismissed with Costs.

Motion by the plaintiff to set aside præcipe order for security for costs.

O. H. King, for the plaintiff's motion.

S. G. Crowell, for the defendant, contra.

CARTWRIGHT, K.C. MASTER:—The motion is based on the ground that plaintiff has adequate assets in the jurisdiction. It is supported only by the affidavit of Mr. King. This states that the action is on notes given for the purchase of an automatic lithographing press, said to be worth at least \$1,000. The defendant's affidavit admits that the notes given in payment are overdue and have not been paid because the machine is not complete and is not and, in his opinion, never will be able to do the work which it was warranted to do.

It is also subject to the usual lien agreement which defendant concedes gives the right to plaintiff to retake possession at any time and to remove out of the province. In such a case as the present the onus is on the applicant and I do not think it is satisfied. A chattel of that kind in such a doubtful state of efficiency cannot be held to satisfy the conditions in *Bready v. Robertson*, 14 P. R. 7; *Feaster v. Cooney*, 15 P. R. 290; *Daniel v. Birkbeck*, 5 O. W. R. 757.

The motion will be dismissed with costs to the defendant in the cause.

MASTER IN CHAMBERS.

FEBRUARY 13TH, 1913

ALLEN v. GRAND VALLEY R.W. CO.

3 O. W. N. 687.

Discovery—Motion for Examination of Foreign Defendant on Commission—Con. Rule 477—Payment of Conduct Money to Bring Defendant to Ontario—Master in Chambers Refused to Make such Order—No Authority to Make Plaintiff Pay for such Proceeding.

Motion by the plaintiff for commission to examine defendant Verner, at New York, for discovery.

G. H. Sedgewick, for the plaintiff's motion.

J. Grayson Smith, for the defendants, contended that the Master had power under rule 477 to order that this examination should take place in Toronto and that plaintiff should pay the necessary conduct money.

CARTWRIGHT, K.C. MASTER:—There is no authority for such an order as Mr. Smith asks. It does not seem reasonable that a party exercising his undoubted right should be required to advance money to save expense and inconvenience to the opposite party and his legal advisers.

The rule, in my opinion, only admits of such orders as were made in *Lick v. Rivers*, 1 O. L. R. 57, and *Lefurgey v. Great West Land Company*, 11 O. L. R. 617, or *Cox v. Prior*, 18 P. R. 492.

It was stated on the argument that defendant would sooner attend here in any case. If so, he must do so at his own expense meantime.

If this is agreed to, the motion will be dismissed with costs in the cause. Otherwise the order must go on the usual terms.

HON. MR. JUSTICE MIDDLETON.

FEBRUARY 14TH, 1912.

REX v. LAWLESS.

• 3 O. W. N. 669.

Intoxicating Liquors—Sale without License—Conviction by Magistrate—Motion to Quash Conviction—No Evidence of Sale—Liquor Purchased for a Hunting Trip.

MIDDLETON, J., quashed the conviction with costs against defendant. Protection order give magistrate. Question whether an executory contract—so long as it remains executory—is within the Liquor License Act not considered.

Motion by the defendant to quash his conviction by a magistrate for selling intoxicating liquors without a license.

J. Haverson, K.C., for the defendant's action.

J. R. Cartwright, K.C., for the Crown, contra.

HON. MR. JUSTICE MIDDLETON:—I have read the evidence. The transaction seems simple, and there is nothing to discredit the evidence given.

A voluntary association, the Turtle Lake Hunt Club, contemplated a trip to the woods. Manning and Lawless were members of the association. Manning arranged with Lawless to purchase the whiskey deemed necessary for this outing, and Lawless sent to Peterborough and bought the whiskey there. He contemplated delivery to Manning, but it was taken, while in transit, by the police.

The conviction is based on the theory that all this is untrue, and that Lawless sold Manning instead of merely acting as purchasing agent for the club.

The only thing looking that way is the receipt—"Received from Sid. Manning, \$18.75 for three cases rye whiskey." This receipt is colourless. It is consistent with a sale; it is also consistent with the statement of Manning that he took it as a voucher. The whiskey at Peterborough cost \$18.75, and Lawless paid the livery man who went for it \$1.50, so that he was out of pocket. It is said this would be taken into account when the expense of the trip came to be adjusted.

I do not think there was any evidence to warrant a conviction, and I have in mind the fact that all evidence upon an enquiry of this kind must be regarded with suspicion, and

that the magistrate is the one to judge, and that this jurisdiction is not appellate and that I must find that there was no evidence—upon which a conviction can be based.

I quash the conviction with costs against the informant, and with a protection order so far as the magistrate is concerned.

In this view of the case I have not to consider the difficult question raised by Mr. Haverson, whether an executory contract—so long as it remains executory, is within the Act.

HON. MR. JUSTICE MIDDLETON.

FEBRUARY 14TH, 1912.

RE JONES & CUMMING.

3 O. W. N. 672.

Vendor and Purchaser—Motion Under Vendors' and Purchasers' Act—Order Declaring Vendor had Shewn Good Title—In such Cases Vendor is always Awarded his Costs.

Dame v. Slater, 21 O. R. 375, followed.

Motion by the vendor under the Vendors and Purchasers Act, for an order declaring that the vendor had shewn a good title and that the purchaser's objections had been answered.

J. Grayson Smith, for the vendor's motion.

J. J. Drew, K.C., for the purchaser, contra. .

HON. MR. JUSTICE MIDDLETON:—Let an order go as asked. The procedure under the Vendors and Purchasers Act, is substituted for an action for specific performance, when the contract is admitted, and the only question is as to the title.

Had this title been referred, the Master would have reported that a good title had been shewn and was shewn before action. In such a case the vendor is always awarded his costs on a motion upon further directions.

I, therefore, give the petitioner his costs, which I fix at \$50, unless the purchaser desires a taxation, when he must pay the amount taxed. See *Dame v. Slater*, 21 O. R. 375.

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COURT OF APPEAL.

MARCH 6TH, 1912.

WALLACE v. EMPLOYERS' LIABILITY ASSURANCE
CORPORATION.

3 O. W. N. : O. L. R.

*Insurance -- Accident -- Passenger on Street Car -- Injured in
Alighting -- Right to Double Indemnity -- Temporary Total
Disability -- Costs.*

COURT OF APPEAL varied judgment of Meredith, C.J.C.P., 20 O. W. R. 385, holding that plaintiff was entitled only to single insurance and not to double insurance, and the \$1,300 awarded him should be reduced to \$650. No costs of appeal.

An appeal by the defendants from a judgment of HON. SIR WM. MEREDITH, C.J.C.P., without a jury, 20 O. W. R. 385, awarding the plaintiff \$1,300 for 26 weeks total disability from injuries received after alighting from a street car in Toronto.

The defendants had issued a policy in plaintiff's favour insuring him against injuries for \$25 a week for "temporary total disability"; the amount to be \$50 a week if the injuries were sustained "while riding as a passenger in or upon a public conveyance."

The appeal to the Court of Appeal was heard by HON. SIR CHARLES MOSS, C.J.O., HON. MR. JUSTICE GARROW, HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MEREDITH, and HON. MR. JUSTICE MAGEE.

N. W. Rowell, K.C., for the defendants, appellants.

D. Urquhart, for the plaintiff, respondent.

HON. MR. JUSTICE MACLAREN:—The claim was resisted (1) on the ground that plaintiff's illness and disability were caused not by the alleged injury but were due to *locomotor ataxia* or an *aneurism*. The trial Judge found for the plaintiff on this issue, and although urged in the reasons for appeal it was abandoned at the argument.

Another ground of defence was that the plaintiff was a commercial traveller, but before the accident in question he had ceased to be such, and had become the keeper of a boarding house and had followed this business during the period claimed for. "Temporary total disability" is defined in the policy as arising from injuries resulting in the "assured being immediately, continuously and wholly disabled and thereby prevented from transacting any and every kind of business pertaining to his occupation." The trial Judge found as a fact that the boarding house business was his wife's and not his; and that the trifling assistance he gave her was not sufficient to affect his claim. This finding seems to be amply justified by the evidence, and the appeal on this ground should be dismissed.

The third ground of appeal is more serious. It is claimed by the defence that even if the plaintiff were entitled to \$25 a week, he is not entitled to \$50 a week or the double allowance as his injuries were not sustained while he was "riding as a passenger in or upon a public conveyance."

The word "passenger" has been variously defined, and it is difficult to frame a definition that would be of general application. It usually means one who travels or is carried in a vessel, coach, railway or street car or other public conveyance entered by fare or contract express or implied. The precise time at which the traveller becomes a passenger or ceases to be such depends upon the facts of the particular case. If the carrier owns or controls the station, platform, or other premises where the journey begins or terminates, the relation of carrier and passenger may begin sooner and terminate later than in the case of a tram or street car where the carrier has no control over the place of departure or arrival. In the present case we have not to determine whether the plaintiff had ceased to be a passenger with reference to the Toronto Railway Company when he received the injury complained of, but whether at that time he was riding as a passenger "in or upon a public conveyance."

The facts of the case as given by the plaintiff in his evidence are quite simple. He was a passenger on an open street car in this city, which stopped to let him off at the regular stopping place just opposite his home. When he stepped on the ground an automobile going in the same direction was about to run him down, and to save himself he tried to get on the street car again, which by this time was in motion. He says he reached out to catch hold of the handle of the car and was jerked around and fell between the car and automobile, his head striking the side of the car as he fell.

We were not referred to any Canadian or English case precisely in point; but there are a number of American cases that are very similar to it.

In *Creamer v. West End Street R. Co.*, 156 Mass. R. 320, a passenger had taken one or two steps from where he touched the ground on leaving his car and was struck by another car. The Court said: "We are of opinion that he was not a passenger when the accident occurred, and that he ceased to be a passenger when he alighted upon the street from his car. The street is in no sense a passenger station for the safety of which a street railway company is responsible. When a passenger steps from the car upon the street, he becomes a traveller upon the highway, and terminates his relations and rights as a passenger, and the railway company is not responsible to him as a carrier for the condition of the street or for his safe passage from the car to the sidewalk."

In *Platt v. The 42nd Street R. W. Co.*, 2 Hun (N.Y.) 124, the plaintiff had left the company's car and was passing the horses which had been drawing it when one of them injured her. It was held that she had ceased to be a passenger on the car and that the liability of the company if any was not that of a common carrier; but depended upon the principles that apply to all persons lawfully using the highway.

Anable v. Fidelity & Casualty Co. (1906), 73 N. J. L. R. 320, is an action on a policy in the same terms as the one in this case—providing for double insurance for an injury "while riding as a passenger in or upon a public conveyance." While the train was standing at a station the assured stepped on the station platform to buy a paper. The train started, and the assured grasped the handrail of one of the cars but fell, and the last car passed over his body, killing

him instantly. The trial Judge held that the rights of the parties must be ascertained by the plain natural meaning of the language used; that he was not in a car nor on a car, nor on any part of a train at the time of the injury; that he was insured not simply as a passenger, but was entitled to the double insurance only if the injury was received while within or on the car or other public conveyance, which was considered a less hazardous risk than while in the act of getting on or off, which might involve a considerable degree of peril. This judgment was affirmed and approved unanimously by the Appellate Court of eleven Judges: (1907), 74 N. J. L. R. 686.

The reasoning in this last case commends itself to my judgment. In the present case the plaintiff was not in fact either in or on the car when he received the injury. If he had been he would not have been injured. It is common knowledge that the vast majority of street car accidents to passengers occur in connection with entering or leaving the car, injuries to those in or on the cars being limited to the rarer cases of collisions or the car running off the track. I do not think that the language of the policy should be strained so as to cover a risk which does not come within its terms; and a risk for which the proper premium was not paid.

I am further of opinion that the plaintiff was not even a "passenger" within the meaning of the policy at the time he received the injury. He had fully completed the journey for which he had entered the car and paid his fare. The car had stopped at his request at the very spot at which he desired to alight, and with which he was very familiar, as it was almost at his own door. He had completely separated himself from the car and was securely landed on the roadway. His subsequent attempt to lay hold of the car and get upon its steps was not for the purpose of resuming his journey or again becoming a passenger on the car, and was in no way connected with his having been a passenger a short time previously. His position was the same as that of any foot passenger on the street who might find himself in the same peril, and might try to take refuge from the deadly automobile. But I do not think it is necessary to decide whether at the time of the accident he was a passenger or not; it is sufficient that he was not then "riding as a passenger in or upon a public conveyance."

In my opinion the plaintiff is entitled only to single insurance and not to double insurance, and the \$1,300 awarded him should be reduced to \$650.

There should be no costs of the appeal.

HON. MR. JUSTICE MEREDITH:—The first question is whether the plaintiff, at the time of his injury, was “riding as a passenger in or upon” the street car; and is not the broader one whether, at that time, he might be considered merely a passenger as against the railway company.

He had been a passenger riding in and upon the street car, but had reached his destination, the car had been stopped to let him down, and he had alighted upon the public road, severing entirely all actual connection between himself and it; but, being put in imminent danger by a rapidly approaching motor car, he caught at the street car again, though it had by that time been started again and was in motion, and in endeavouring to escape injury from the motor car by getting upon the street car, fell, or was thrown down, coming in contact with the moving motor car, and so was severely injured. His purpose in trying to get upon the street car again was not to resume his journey, that was ended, nor was it to begin a new journey, it was solely to escape injury by the negligently driven car. It is idle to say that there was negligence on the part of the railway company, if that would make any difference; how could their servants foresee and be blameable for the misconduct of the driver of the motor car; it was at the plaintiff's instance, and upon his signal, that the street car was stopped at this alighting place; an entirely proper place to stop for that purpose; the danger was something not foreseen by the plaintiff or anyone else, because doubtless not apparent until the motor car was almost upon him; avoidable, with any sort of care on the part of its driver, up to almost the last moment.

Under these circumstances it is impossible for me to find that the man was “riding in or upon” the street car when he was injured; if he had been in or upon the street car he would not have been injured as he was. The case would have been different if he had, after alighting, boarded the car again with the intention of resuming his journey, or of beginning a new one; but nothing like that was the case. Their plain meaning ought to be given to plain words, even though the

result be different from that which one would prefer. And such is the effect of the cases in the Courts of the State of New Jersey, which, though very much in point, were not referred to at the trial.

The case, therefore, is not one for "double indemnity" under the policy in question, but of single indemnity; and the amount of the judgment entered for the plaintiff ought to be reduced accordingly.

The appeal upon the other ground fails entirely; there is ample evidence to support the finding that the plaintiff's injury caused him "temporary total disability" within the meaning of those words contained in the policy.

DIVISIONAL COURT.

MARCH 7TH. 1912.

WARD v. SAUNDERSON.

3 O. W. N.

Trespass to Lands—Erection of Four Storey Warehouse—Encroached Few Inches on Neighbour's Lands — Bona Fide Belief that Land was Defendant's.

DIVISIONAL COURT affirmed judgment of Denton, Co.C.J., allowing defendant to retain a few inches of plaintiff's land upon which his building encroached, upon payment of \$50 as compensation.

An appeal by defendant from a judgment of His Honour JUDGE DENTON, of York County Court, on the counterclaim of defendant.

Defendant is owner of house known as No. 32 on north side of Oxford Street and adjoining lands forming the westerly portion of lot No. 3 on north side of Oxford street; plaintiff is owner of the rear part of the lands immediately to the east.

Early in 1909 plaintiff contemplated the erection of a warehouse several storeys in height, upon his land. At this time defendant had a quantity of earth upon the rear portion of her lot, which could not conveniently be removed, by reason of there being no way of access. An agreement was made by which advantage was taken of the situation and

plaintiff agreed to remove this earth across his land before his building was completed. The earth was removed, but some dispute arose as to the price to be charged for its removal, and the action was brought to recover plaintiff's claim in respect thereof.

The action was commenced 11th July, 1911, and at this time no counterclaim was filed, but on 21st November, 1911, leave was obtained pursuant to which the counterclaim was delivered, claiming damages for injury done to certain trees and vines during the course of the erection of the warehouse, and also claiming that the wall of the warehouse trespassed upon and occupied 4 inches of defendant's land, and that an excavation had been made beyond this 4 inches during the construction of the wall, which had been filled up with broken brick and rubbish.

The appeal to Divisional Court was heard by HON SIR GLENHOLME FALCONBRIDGE, C.J.K.B., HON. MR. JUSTICE BRITTON, and HON. MR. JUSTICE MIDDLETON.

N. F. Davidson, K.C., for the defendant.

W. Proudfoot, K.C., for the plaintiff.

HON. MR. JUSTICE MIDDLETON:—At the trial it clearly appeared that the defendant's claim was much exaggerated. For the injury to the shrubs, trees and vines, the Judge allowed \$35. Upon the argument of the appeal we thought the amount allowed was ample. The Judge also found that the wall encroached slightly upon the defendant's land; and pursuant to the statute, 1 Geo. V. ch. 25, sec. 33, he allowed to her \$10 as the value of the land encroached upon, which he permitted the plaintiff to retain.

Upon the appeal the defendant contends that the case is not brought within the provisions of the statute in question and that the amount awarded is entirely inadequate. She also asks leave to adduce further evidence for the purpose of shewing that the footing of the wall and some weeping tiles encroach further upon her land.

The statute provides that "where a person makes lasting improvements on land under the belief that the land is his own" the Court may direct that person to retain the land, making compensation therefor, if in the opinion of the Court this is just.

The principle governing the interpretation of the statute is indicated in *Chandler v. Gibson*, 2 O. L. R. 442; where it is said that it is "a question in each case for the tribunal to determine whether the person claiming for the improvements made them under the bona fide belief that the land was his own."

In this case the boundary between the land of the plaintiff and the land of the defendant was a fence that had been standing for some thirty years. This fence was probably not upon the true boundary line. The evidence of the plaintiff is that he intended to recognize this fence as correctly defining the boundary; that he took the fence down—or at any rate removed the boards from the posts—thinking that the wall of his building would supersede it; that he marked the location of the fence by a line, and that his intention was to build up to the boundary; and he believes that he has not in any way encroached on the defendant's land.

No complaint was made for more than two years, although the defendant was residing in her house during the erection of the building.

The County Judge has found that there was a *bona fide* belief on the part of the plaintiff that the land was his own.

It is not very clear, from the reasons given by the learned Judge, what the exact extent of the encroachment found by him was. We are inclined to the view that it was somewhat greater than he thought.

According to a survey made in 1891, the defendant's lot had a frontage of 26 feet 2 inches, and a width at the rear of 26 feet 4 inches. Her deed calls for 26 feet only. According to recent surveys, the width at the rear is 25 feet 9 inches; and as the old western fence is still in the same place, this indicates an encroachment of 8 inches, although in the action an encroachment of 4 inches only is charged; the discrepancy possibly arising from a comparison of the recent survey with the requirements of the deed.

We do not think that we should interfere with the finding of the learned Judge that the plaintiff acted in good faith. It is in the first place unlikely that he would erect the wall of a four-storey warehouse upon property to which he knew he had no claim; but we think the amount to be allowed for the land occupied ought to be increased. Leave should be given to the defendant to amend her counterclaim so as to

claim an encroachment of 8 inches instead of 4 inches; and the title to this 8 inches is to be vested in the plaintiff upon payment of \$50 as the price of the land. But as this amendment is an indulgence to the defendant, and as she has failed in the branch of her appeal relating to the value of the fruit trees, we think that there should be no costs of the appeal.

We, therefore, direct that the judgment below be varied as indicated, and that, save as aforesaid, the appeal be dismissed without costs.

We draw attention to the form of judgment in the Court below, where the trespasser is allowed to retain the lands encroached upon, he making compensation, the judgment should direct that the land be vested in the trespasser.

At the trial no enquiry appears to have been made whether the defendant's lands are free from mortgage. If there is an incumbrance, the allowance by way of compensation should be paid to the mortgagee, unless his consent to payment to the defendant is filed.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B., and
HON. MR. JUSTICE BRITTON:—We agree.

MASTER IN CHAMBERS.

FEBRUARY 14TH, 1912.

CANADIAN KNOWLES v. LOVELL-McCONNELL.

3 O. W. N. 690.

Discovery—Examination of Manager of Defendant Company—Scope of Examination—Production of Books and Records—Action for Breach of Contract—Enquiries Relevant as to Damages—Admissibility of Evidence to be Passed upon by Trial Judge.

The plaintiff issued a commission to examine witnesses at New York, one of them being the manager of the defendant company. It was proposed to ask certain questions and for production of the books and record of the defendant company. The counsel requested the Master in Chambers to give his opinion as to the right of the plaintiff to have such discovery.

M. L. Gordon, for the plaintiff's motion.

Wm. Proudfoot, K.C., for the defendant, contra.

CARTWRIGHT, K.C., MASTER:—The statement of claim alleges an agreement with the assignor of the plaintiff to appoint him sole selling agent for Canada until 1st April, 1911, and to deliver him \$10,000 worth of their products. It further alleges that this contract was broken by the defendant company in both respects, and alleges damages therefrom of \$5,000.

The statement of defence specifically denied these material allegations and puts plaintiff to proof thereof. It then goes on to allege failure on the part of the plaintiff to comply with the terms of the contract (which though denied before, seems now to be admitted).

The matter comes before me now, as I understand, as if the questions had been asked and the witness had refused to answer or make production. If the examination was by way of interrogatories there would certainly be no power to limit them—see *Toronto Industrial Exhibition Association v. Houston*, 9 O. L. R. 527, and cases cited. I think the same principle applies to the present case, as I stated at the argument.

I also think that the plaintiff is entitled to shew that his allegations which defendant has denied are true and to prove by defendant's books if it is a fact that sales were made in Canada prior to 1st April, 1911, and subsequent thereto also. The latter enquiry being relevant to the damages if the Court holds plaintiff entitled to recover.

It was said by defendant's counsel that plaintiff should not be allowed to investigate their business and find out the names of their customers. This objection cannot prevail to defeat plaintiff's right to such discovery as may assist his case. The amount of sales made by the defendant company and the prices obtained will be the best evidence as to the damages, if any, which plaintiff can recover.

Such questions should be answered and information given leaving it to the trial Judge to pass on its admissibility as was said by Denman, C.J., in *Small v. Nairne* (1849), 13 Q. B. 840.

HON. MR. JUSTICE MIDDLETON IN CHRS. FEB. 14TH, 1912.

CLARK v. BARTRAM.

3 O. W. N. 691.

Parties—Motion to Add Party Plaintiff—Master in Chambers Refused Motion—Assignment of Claim—Joinder of Parties and Causes of Action—Middleton, J., Dismissed Appeal with Costs.

An appeal by the plaintiff from an order of the Master in Chambers, refusing to add Thomas Crawford as a co-plaintiff.

See judgment of Master in Chambers on a former motion, 20 O. W. R. 530.

J. Shilton, for the plaintiff, appellant.

F. E. Hodgins, K.C., for the defendant, contra.

HON. MR. JUSTICE MIDDLETON:—Clark may have a cause of action or may not, it would be premature to discuss this question, but from what is said by Clark during the examination of Crawford, it is clear that what is sought is to add Crawford so that he may in this action repudiate a release which it is said he gave to Bartram, of the personal claim against him—Crawford executed the assignment to Clark, not for the purpose of enabling Clark to attack Bartram upon any such ground, but to enable Clark more effectually to assert his own claims, and Crawford does not now assert that he was in any way defrauded by Bartram, but as Clark says: "He does not know, when the facts come out it will shew he has a cause of action."

The suggested cause of action is not one that can be properly joined with the main claim of Clark.

If the assignment from Crawford to Clark was supposed to convey this cause of action, it no doubt failed to carry out this intention and Clark cannot successfully set up this claim, but I should not now aid him by adding a plaintiff in an action brought by one without title, the plaintiff, who alone can sue, particularly when this would result in an improper joinder.

The appeal fails and is dismissed with costs to the defendant in any event of the cause.

DIVISIONAL COURT.

DECEMBER 18TH, 1911.

SIMPSON v. RUBECK.

3 O. W. N. 577.

*Mechanics' Liens — Building Contract — Non-completion of Work—
Substantial Performance—Costs.*

Appeal by the plaintiff from the judgment of Mr. J. A. C. Cameron, Official Referee, dismissing without costs an action brought by the plaintiff to recover \$170, being the balance of the contract-price, including extras, for the construction of a verandah for the defendant, and to enforce a mechanics' lien therefor.

The Referee held that the plaintiff, not having completed his contract in accordance with the terms thereof in respect of the items in the judgment mentioned, was not entitled to payment or to a lien, upon the authority of *Sherlock v. Powell*, 26 A. R. 407, and *Cole v. Smith*, 13 O. W. R. 774.

The appeal was heard by HON. SIR WM. MEREDITH, C.J.C.P., HON. MR. JUSTICE TEETZEL, and HON. MR. JUSTICE KELLY.

C. W. Plaxton, for the plaintiff. The contract rested in parol, the written tender of the plaintiff having been accepted verabally by the defendant, with the qualification or upon the understanding that "A1" lumber was as good as the plaintiff was ordinarily using in verandahs, and that the verandah in question was to be as good as the one next it, which had been built by the plaintiff; that the evidence shewed that "A1" lumber was not clear lumber, but the grade next to it, and was not disqualified so long as it was solid and free from black knots; that the evidence shewed the lumber used to be unobjectionable in these respects, and that the contract had otherwise been complied with. *Sherlock v. Powell* and *Cole v. Smith*, counsel contended, were distinguishable, the work and materials having been approved by both the defendant and her husband; and that, under sec. 7 of the Mechanics' Lien Act, the husband in this case must for such purposes be presumed conclusively to be the agent of his wife. In support of the doctrine of "substantial per-

formance" counsel relied on Addison on Contracts, 10th ed., pp. 813, 814; *Lucas v. Godwin*, 4 Sc. 509, 6 L. J. C. P. 205; *Stavers v. Curling* 6 L. J. C. P. 44; *Thornton v. Place*, 1 Moo. & R. 218; *Adams v. McGreevy*, 17 Man. L. R. 115; *Davis v. O'Brien*, 18 Man. L. R. 79; Rockel on Mechanics' Liens (1909), secs. 49, 64. Once the lien attaches, the statute, being a remedial one, should be construed liberally. Under the authorities and the evidence, justice would be done by deducting the price of one coat of paint from the contract-price, especially as the defendant had admitted that she offered to pay the plaintiff the full amount if another coat of paint were put on. Section 49 of the Mechanics' Lien Act, 1910, counsel contended, should be construed liberally in favour of the plaintiff.

Louis M. Singer, for the defendant, contended that it would be impossible to fulfil the contract unless the verandah were rebuilt with new materials. (He was stopped by the Court.)

Their Lordships judgment was delivered by

HON. SIR WM. MEREDITH, C.J.C.P.:—We have no right to enforce moral obligations. We think this appeal fails. It is not a case in which it is necessary to determine how far the doctrine of substantial performance obtains, because, upon the findings of the learned Referee, which are supported by the evidence, there was no performance of the contract. It is not a case of slight defects; but there was a serious failure to perform important terms of the contract.

The learned Referee finds that the lumber used in the construction of the verandah was not as specified in the contract; that the verandah was not properly constructed in respect of the joists; and does not comply with the city by-laws regulating the construction of buildings; the upstairs balustrade was not properly secured; the door sill put in by the plaintiff was not properly secured; the eaves-troughs were not properly hung; the painting was not in accordance with the specifications, and has not been properly applied; and that the downstairs balustrades are not properly connected.

Now, to call these trifling defects in the work seems to me a misuse of the English language. They constitute a serious and substantial failure to perform the contract in its

material and important aspects; and I think that no other conclusion could be arrived at than that, according to law, the plaintiff, having failed to perform his work according to the contract, was not entitled, in an action, to recover the amount to which, if he had performed it, he would have been entitled, or to enforce his lien.

The doctrine that Mr. Plaxton has attempted by his argument to set up again, of substantial performance, as far as this Court is concerned is concluded by the decision in *Sherlock v. Powell* 26 A. R. 407. Dealing with that doctrine, Mr. Justice Lister, delivering the judgment of the Court, says (p. 410): "The doctrine of 'substantial performance' pressed by counsel for the plaintiff, and which is held by the Courts of many States of the neighbouring Union, has never been adopted by the English Courts or by the Courts of this country. Mr. Hudson, in the second edition of his work on Building Contracts, vol. 1, p. 201, refers to this doctrine thus: 'Where the contract is entire, and completion is a condition precedent to payment, no English case has yet decided that any allegation of "substantial performance" will enable the builder to recover, unless there is some act of the employer, such as acceptance, waiver, or prevention, or evidence from which a contract can be implied to pay for the work as performed and according to value, although it is not entirely completed.'" Then the learned Judge goes on to point out that the author refers to certain cases which he names; then he proceeds: "The plaintiff, having failed to establish that the contract was performed or that its non-performance was owing to the default or concurrence of the defendant, cannot, as it seems to me, on the authorities, recover in this action."

It is impossible to come to the conclusion, on the evidence, that the defendant or her husband, by anything that was done, acquiesced in the improper work, or the use of improper materials by the plaintiff.

There is nothing from which it could be found as a fact that they acquiesced in the substitution of the inferior lumber for the lumber that was to be used, or that the defective work was to be accepted as if it had been in accordance with the contract.

It is an extraordinary doctrine to urge that, where a person makes a contract with a builder, no architect intervening, to put up a verandah or house in accordance with a

certain stipulation, because the person who makes the contract with the builder is there and sees the work going on, he is therefore prevented, if it turns out afterwards that the builder has put in improper material or done improper work, from objecting to it. There is no such law, and it is contrary to common sense.

It is very probable that these people knew nothing about matters of that kind, and it requires somebody of experience in work of the character of that which was being done to tell what we are asked to assume the defendant or her husband knew.

It may be that this is a very hard case, and that the defendant has got a verandah nearly as good as that which she contracted for, and yet the result of this judgment is, that she escapes paying anything for it except the \$10 which she has already paid.

This judgment, however, does not in any way preclude the plaintiff from recovering if it is possible for him to rectify what has been wrongly done. All that is decided is that at the time this action was brought he had no cause of action in respect of the contract.

We think, under all the circumstances, that we should follow what was done by the Official Referee, and dismiss the appeal without costs.

DIVISIONAL COURT.

JANUARY 26TH, 1912.

3 O. W. N. 616.

CADWELL v. CAMPEAU.

Contribution — Co-sureties — Bond for Fulfilment of Municipal Contract — Advances Made and Work Done by One of Three Bondsmen — Assignment of Contract to Him — Agreement between Sureties — Construction — Extent of Liability for Contribution.

Appeal by the defendants from the judgment of HON. SIR JOHN BOYD, C., in favour of the plaintiff, in an action for contribution, upon bond given by the plaintiff and defendants to the Municipal Corporation of the Town of Sandwich for \$5,000 for the due fulfilment of a contract between John Lorne & Son and the town corporation for the construction of a sewer.

On the 12th May, 1909, John Lorne & Son contracted with the corporation to construct a sewer, upon certain terms and conditions. One clause of the contract provided for payments during the progress of the work, under progress certificates of the engineer "of 80 per cent. on account of work done and materials supplied under this contract and for duly authorized extras, the value of such work to be in proportion to the amount payable for the whole work and authorized extras, and the balance of the said contract and all duly authorized extras, within thirty days after the contractors shall have rendered to the engineer a statement of the balance due and shall have obtained and delivered to the corporation the final certificate of the engineer shewing the net balance payable to the contractors."

Prior to the 28th September, 1909, the contractors became involved and applied to the plaintiff for financial assistance. Up to that date, the plaintiff had furnished material for the work, amounting to \$595.63, and had advanced in cash for labour and material \$1,265.98; and the contractors, requiring still further advances, applied to the plaintiff, who agreed to advance for wages the further sum of \$933, upon the contractors assigning to him all sums of money due or accruing due under the contract, and they expressly authorized the corporation to pay the sum to the plaintiff, who was authorized to give the corporation "full and ample releases and discharge for the further payment of any such money under the said contract."

On the 6th October, 1909, the plaintiff and defendants, desiring to save themselves as far as possible from liability under their bond, entered into an agreement. This agreement refers to the original contract and the bond, and further recites that the contractors "have failed to carry out the provisions of the said contract and have been obliged to apply to the said party of the second part, one of the said sureties as aforesaid, for financial assistance, and credit, work, and assistance in the carrying out of the said contract." And "whereas all of the parties to this agreement are equally responsible on said bond, and this agreement is entered into for the purpose of appointing the party hereto of the second part to represent all the parties to this agreement in seeing that the said contract is carried out and performed by the said John Lorne & Son so as to save the parties hereto from any loss or costs or damage in connec-

tion therewith, and the parties of the first part hereby appoint the party of the second part, and authorise him to continue to do all things necessary that he may think in the interests of himself and the parties of the first part as co-sureties on said bond and to protect them respectively from any liability or loss in connection therewith and do all things necessary and to advance money necessary for the carrying out of the said work so as to protect the parties thereto. And the parties of the first part and the second part mutually agree to become responsible for their respective shares or proportion of one-third each for any money that may be necessary to be advanced, or any loss that may be occasioned under the said bond, or expenses in connection therewith."

On the 9th October the contractors entered into a further agreement with the plaintiff. This agreement refers to the assignment of the 28th September and recites that "whereas since the said assignment the party of the second part has been compelled to advance the further sum of \$1,000 for material and expenses, and the further sum of \$781.10 for wages in connection with the said contract work, on the understanding and agreement that the parties hereto of the first part would further assign all moneys due and accruing due under the said contract for the repayment of the said moneys so advanced." It then proceeds: "In consideration of the recitals above made and the further advance of money aggregating \$1,781.10, the contractors assign to the plaintiff all moneys due and accruing due under the said contract for the repayment of both the \$2,794.63 advanced and referred to in the assignment, and also the further advance of \$1,781.10, with authority for the corporation to pay and for the plaintiff to receive all such sums.

The judgment of the Chancellor was, that the plaintiff should be allowed all his outlay in money and materials to the contractors which went into the work in question, and all his outlay in work and materials upon the completion of the contract after it was assigned to him; that in taking the account all just allowances should be made for expenses of litigation incurred in protecting the various assignments and for the personal supervision of the plaintiff in the work: that, after deducting all moneys received from the contract, the balance should be borne equally by the three bondsmen, the plaintiff and the defendants, to the extent of the liability created by the bond.

The appeal was heard by HON. MR. JUSTICE CLUTE, HON. MR. JUSTICE LATCHFORD, and HON. MR. JUSTICE MIDDLETON.

E. S. Wigle, K.C., for the defendants.

A. H. Clarke, K.C., for the plaintiff.

HON. MR. JUSTICE MIDDLETON:— . . . The effect of the contract between Lorne & Son and the town corporation was to entitle Lorne & Son to receive on progress certificates 80 per cent. of the value of the work done. The remaining 20 per cent. was to be retained by the town corporation, and would be answerable for any deficiency arising from Lorne & Son's default.

The assignment by Lorne & Son to Cadwell would operate on this 20 per cent., subject to this right of the town. The sureties would be entitled to require the town to apply this 20 per cent. in the way indicated, and their right would be paramount to any right which Cadwell would have as assignee of Lorne & Son. Cadwell, as assignee, would have no greater or higher right than his assignors; and clearly Lorne & Son could not demand this 20 per cent. from the town corporation, to the prejudice of their sureties.

When Cadwell made advances to Lorne & Son for the purpose of enabling them to carry on their contract, he had no right to claim contribution from the co-sureties, even though the making of these advances enabled Lorne & Son to that extent to carry on their contract work. It seems to me quite immaterial that Cadwell made the advances because he was surety. The contract of the sureties with the town corporation made them liable for the loss which the town corporation might suffer from Lorne & Son's default. The right to contribution is a right with respect to any sums paid the town corporation. We cannot make this right any greater or wider; to do so would be to impose upon these defendants a liability which they never assumed, and this cannot be justified merely because the liability may be no greater than the liability which they did assume, had it not been for the voluntary action of Cadwell.

This precise point is well determined in *Ludd v. Chamber of Commerce*, 60 Pac. R. 713. The facts were precisely similar. The obligation of the defendants "was to the insurance company alone (i.e., to the building owner), and there is neither allegation nor proof that it ever made or had any claim for damages under the bond. But, it is argued, a

breach of the bond and consequent damages to the insurance company would have occurred if certain of the sureties had not pledged their individual credit for money with which to complete the building. . . . It does not follow that the action of a part of the sureties in borrowing money for the Chamber of Commerce (i.e., the contractors) to use in the construction of the building will bind a non-participating surety . . . Each surety had a right to stand upon the letter of his contract, and, in case of a breach or threatened breach of the bond, to exercise his own judgment as to whether it was better for him to suffer default and answer in damages to the obligee in the bond or to become liable on a new obligation."

When it became apparent that Lorne & Son were about to make default, a new obligation was, on the 6th October, entered into. The sureties agreed that the work should be completed by Cadwell; and for the loss in the completion of the work under that agreement they are all responsible, and the defendants must contribute. I cannot construe that agreement as in any way an assumption of the liability of Lorne & Son to Cadwell for advances theretofore made, but its operation is entirely in the future.

Upon the outgoings under that agreement, Cadwell must credit the money received from the town for work done under it; and also the 20 per cent. retained from the value of all work done before that date. This 20 per cent. is salvage saved by the joint efforts and liability of the sureties under this agreement.

The money paid on the 8th October was, no doubt, the 80 per cent. on work done prior to that agreement; and, if so, Cadwell had the right to this under the prior assignment, and need not bring this into account.

The judgment should be varied by making declarations in accordance with the above, and directing a reference upon this footing.

There may also be a declaration that Cadwell is entitled to reasonable remuneration for his services under the agreement. As each party claimed too much, there should be no costs up to this time, and the costs of the reference may be reserved. For the guidance of the Court the parties should now name sums which the one is ready to pay and the other to receive, so that the blame of any further litigation may be duly apportioned.

HON. MR. JUSTICE LATCHFORD:—I agree.

CLUTE, J. (after setting out the facts as above):—On the argument, counsel for the defendants contended that the plaintiff was not entitled to the material and advances prior to the agreement of the 6th October; that, having regard to the work then done and to the balance still in the hands of the corporation, there was sufficient to complete the contract; and that the reference should proceed upon these lines.

The plaintiff in his evidence states that the advances made subsequent to the assignment of the 28th September were upon the understanding and agreement with the contractors that he should be paid out of the funds still in the hands of the corporation. It will be seen that, under the assignment of the 28th September, all moneys due and to become due were assigned; and, having regard to the evidence and the surrounding circumstances, I think there can be no doubt that it was the understanding between the plaintiff and the contractors that out of the fund in the hands of the corporation he should be paid for all material and advances made by him, and that the assignment on the 9th October, was simply carrying out what had been previously agreed upon.

Although there is no special finding upon this point, this I take it to be the meaning of the judgment pronounced at the trial. I can see no reason to impugn the validity of these assignments or the plaintiff's right to apply the moneys received by him from the corporation in payment of material and advances so made by him; and, in this view, the plaintiff's claim to contribution is sufficiently supported.

I am strongly inclined to the view that, upon the true construction of the agreement of the 6th October, the plaintiff is also entitled to recover. That agreement recites the contract and the bond and the failure of the contractors to carry out the provisions of the contract, and an application to the plaintiff, one of the said sureties, for financial assistance, credit, and work in carrying out the said contract. It recites that the agreement was entered into for the purpose of appointing the plaintiff to represent all the parties to the agreement in seeing that the contract is carried out so as to save the parties from loss, "and the parties of the first part hereby appoint the party of the second part and authorize him to continue to do all things necessary that he may think in the interests of himself and the parties of the first part as co-sureties on said bond," etc.

This, I think, clearly shews that all he was about to do under this agreement was simply a continuation of what had been done by him with a view to carrying out the agreement.

It then provides that the parties of the first and second part agree to become responsible for their respective shares or proportions of one-third each for any moneys that may be advanced or any loss that may be occasioned under the said bond or expenses in connection therewith. Having regard to the facts of the case, I think that what the agreement means is this, that the plaintiff was to continue to do all things necessary to complete the contract, and the defendants would be responsible for their proportion of any loss in so completing the work. The wording in the last clause is obscure. It says, "For any loss that may be occasioned under the bond or expenses in connection therewith." I think the fair meaning of that is, for any loss arising under the bond by reason of the contract not being completed or in the endeavour to carry it out.

I prefer, however, to rest my judgment upon the first ground.

The appeal should be dismissed with costs.

Judgment varied as stated by HON. MR. JUSTICE MIDDLETON; HON. MR. JUSTICE CLUTE, dissenting.

HON. MR. JUSTICE BRITTON IN CHRS. FEB. 14TH, 1912.

CLARKSON v. McNAUGHT AND SHAW.

(AND THREE OTHER CASES.)

3 O. W. N. 670.

Judgment — Summary — Motion for under Con. Rule 603—Action on Promissory Note.

MASTER-IN-CHAMBERS. 21 O. W. R. 198, *held*, that defences should be dealt with at the hearing, and refused the motion.

BRITTON, J., dismissed plaintiff's appeal with costs to defendants in the cause.

An appeal by the plaintiff from the order of the Master in Chambers, 21 O. W. R. 198, dismissing an application under Con. Rule 603, for summary judgment on promissory notes.

R. F. MacKelcan, for the plaintiff, appellant.

F. Arnoldi, K.C., for the defendants, respondents.

HON. MR. JUSTICE BRITTON:—Upon the best consideration I can give to all of the many facts in these cases, and to the argument of counsel, I am of opinion, and for reasons stated by the learned Master, that the motion for speedy judgment should not prevail. It was hardly strenuously contended that, apart from the consent of agreement given to Mr. Stavert by Mr. Arnoldi and others, this was a case which properly came under the Rule. Apart from that agreement, there was apparently a defence which might or might not succeed, but which the defendants were entitled to set up and to have tried.

Then, assuming that this appeal could be treated as a motion to a Judge in Court to enforce the agreement, is it an agreement such as, after action brought, should be enforced in so summary a way? I do not think it is.

The agreement relied on is dated the 13th January, 1909. It is only in the form of a letter to Mr. Stavert, then trustee of the Sovereign Bank. By an instrument under seal, and dated 5th May, 1911, Mr. Stavert, for alleged valuable consideration, assigned to the plaintiff individually the full benefit of the alleged contract of the 13th January, 1909, and he authorized Mr. Clarkson to enforce the said contract and the undertakings therein contained, either in his (Stavert's) name or in the plaintiff's name, and to commence, institute, and prosecute all necessary proceedings for that purpose.

This action was commenced on the 26th October, 1911. The writ was specially indorsed. No reference in the action to the enforcement of the contract of 13th January, 1909. If the defendants, upon the facts, outside of the contract referred to, would be entitled to defend, they are not, in my opinion, precluded from doing so by reason of the contract. They may, if so advised, and if the facts warrant it, question the contract, its assignability, and the assignment of it.

The appeal should be dismissed with costs to the defendants in the cause.

The plaintiff asked that, in the event of this appeal being dismissed, and in view of the plaintiff appealing from my decision, that the plaintiff should be allowed to deliver statement of claim, and that the defendants should plead thereto pending such further appeal and without prejudice to proceeding in appeal. I see no objection to the order dismissing the appeal so providing.

MASTER IN CHAMBERS.

MARCH 8TH, 1912.

POWELL REES v. ANGLO-CANADIAN MORTGAGE
CORPORATION.

3 O. W. N.

*Process—Service of Writ of Summons on Foreign Corporation —
Service on Alleged President Residing in Ontario — Motion to
Set Aside Service Should be Made on Behalf of Company.*

Motion by E. R. Reynolds to set aside service of a writ
of summons.

The defendant company was stated on the argument to
have been incorporated in England but not as yet having a
license to do business in this province. The action is on a
judgment recovered in England against the company for
over \$15,000 on 9th February last.

The writ was served on E. R. Reynolds, who supported
his motion by his own affidavit in which he says that he is
not an officer of the defendant company or in any way auth-
orised to accept service for them.

There is no affidavit in answer and an offer to enlarge
the motion so as to allow of Mr. Reynolds' cross-examination
was declined. It was contended that the motion must fail
on two grounds: (1) because it should have been brought
by the company; and (2) that the affidavit filed was insuffi-
cient because it did not say that at the time of service the
deponent was not an officer of the defendant company.

Counsel for the plaintiff asserted that Mr. Reynolds was
the president and had dealt with him for the past two or
three months on that understanding.

John Macgregor, for the motion.

M. C. Cameron, for the plaintiff, contra.

CARTWRIGHT, K.C., MASTER:—I agree with the conten-
tion that the motion could only be made on behalf of the
company. This has always been done in all the similar mo-
tions: see *Burnett v. Gen. Accident Co.*, 6 O. W. R. 144;
Mackenzie v. Fleming Revell, 7 O. W. R. 414. This is not
the case of subs. service when in some cases it may be per-
missible to move. See *Taylor v. Taylor*, 6 O. L. R. 545; or

take the steps suggested in *Bound v. Bell*, 9 O. W. R. 541, Here if the service has been improperly made the plaintiff will proceed at his peril. But he must be left to do as he may be advised.

I think the second objection also well taken, and the motion cannot succeed and will be dismissed. The question of costs will be reserved until the case has proceeded further and light has been obtained as to the relations (if any) between the applicant and the defendant company.

If desired time for appearance extended until Monday, 11 a.m.

HON. MR. JUSTICE RIDDELL.

FEBRUARY 14TH, 1912.

RE JONES.

3 O. W. N. 672.

Will — Construction — Motion under Con. Rule 938 by Assignee for Benefit of Creditors of Beneficiary — Direct Devises—Devises in Trust — Implication — Modification — "On the Death of Any of Said Sons or Daughters or upon the Termination of Their Interest in the Said Property" — Administration of Estate —Assignee given His Costs out of Estate coming to Assignor Beneficiary—Otherwise No Costs.

Motion under Consolidated Rule 938 for an order construing the will of the late Henry Jones. The motion was made by Richard Tew, as assignee, for the benefit of the creditors of Charles Edward Jones, a beneficiary under said will.

The late Henry Jones died in 1909, all his children surviving him. The material parts of his will were as follows:

1. Unto and to my son Charles Edward Jones I will and devise the following property, viz.: (a) my double house and lots . . . in the town of Uxbridge . . . ; (b) my mill property in the township of Scott . . . ; (c) my stable and lot on the west side of Bascom street . . . ; (d) my red grain warehouse . . . These devises . . . I value at \$6,800. (e) One-quarter of my real estate situate on east side of the town of Uxbridge . . . about four acres . . . This devise . . . I value at \$55 per acre.

2. Unto and to my daughter Zella Jane Jones I will and devise the following property, viz.: (a) my present home-

stead and lots in connection therewith . . . ; (b) . . . what is known as the Anderson lot . . . town of Uxbridge. These devises . . . I value at \$2,900. (c) Unto and to my daughter Zella Jane Jones I will and bequeath all my household goods and furniture . . . (d) Unto and to my daughter Zella Jane Jones I will and devise the east half of lot 6 . . . containing 100 acres; (e) the east 50 acres of the south half of lot 7 . . . ; (f) lot 8 . . . the Stewart or Harper property; (g) the south-east quarter of lot 28 . . . All of which said property I value at . . . \$2,600.

3. Unto and to my executors and trustees . . . I will and devise in trust for my daughter Florence Henrietta Evans the following property, subject to the terms and conditions set out in paragraph 13 hereof, viz.: (a) the Dobson & Crosby store . . . which I value at \$2,000; (b) one-quarter of my real estate . . . on east side of . . . Uxbridge . . . about 4 acres . . . This devise I value at \$55 per acre.

4. Unto and to my executors and trustees . . . I will and devise in trust for my daughter Eliza Sarah Amelia Jones the following property, subject to the terms and conditions set out in paragraph 13 hereof, viz.: (a) the Weldon farm . . . which I value at \$800; (b) one-quarter of my real estate situate on east side of the town of Uxbridge . . . about four acres . . . I value the lot with the building on at \$800 and the balance of the land at \$55 per acre.

5. Unto and to my executors and trustees . . . I will and devise in trust for my son Robert Henry Jones the following property, subject to the terms and conditions set out in paragraph 13 hereof, viz.: (a) my hardware store and block . . . together with all of the fixtures and office furniture . . . This devise I value at . . . \$7,000; (b) the north storehouse . . . which I value at \$600; (c) one-quarter of my real estate situate on east side of the town of Uxbridge . . . about four acres . . . This devise . . . I value at \$55 per acre.

6. (Describes the method of division of the land east of the town of Uxbridge, and provides that the devises are to be "subject to the terms and conditions set out in paragraph . . . of this my last will and testament.")

7. All the residue of my estate, both real and personal, I direct my executors . . . to sell . . . and the proceeds thereof I will and bequeath as follows: (a) Unto and to my daughter Zella Jane Jones I will and bequeath . . . \$2,000 over and above what the other children may receive . . . (b) The residue then remaining to be so distributed that each of my five children will receive shares equal in value out of my estate after taking into consideration the values I have placed on the property willed to each of my said children, subject in the case of all of the children to the same terms and conditions as set out in paragraph 13 of this . . . will . . .

8. In the distribution of my property my intention is that all my children should receive equal shares from my estate with the exception of the \$2,000 which I have willed and bequeathed to my said daughter Zella . . .

9. Unto and to my executors and trustees . . . I will and devise in trust for my estate and which shall form part of the money to be divided among my heirs when converted into money, my property in . . . the township of Sinclair . . . in trust to sell the same . . . and the proceeds to go into my estate for the benefit of my family, subject to the terms and conditions of paragraph 13.

10. I will and direct that any accounts which I have charged to any of my children shall be deducted from their share in the estate and to be considered as that amount paid on their shares.

11. I further will and direct that all manufactured lumber and wood . . . shall be sold . . . for the benefit of my estate.

12. Unto and to my executors and trustees . . . I will and devise in trust for my estate and which shall form part of the money to be divided among my heirs when converted into money, my property in New Ontario. . . .

13. The terms and conditions and limitations in the several devises and bequests to my executors and trustees in trust for my children . . . are as follows: My said executors and trustees are to rent the real estate willed to each child . . . and invest the personal property . . . and apply the several incomes as they . . . may think fit for the maintenance of my said several children (their wives or husbands as the case may be) and children for and during the terms of the natural lives of my said several children,

with this proviso that if my said children or any of them become insolvent or attempt to sell, mortgage, or anticipate in any way the said rents and profits of his or her share, then the one so attempting to sell, mortgage, or anticipate shall lose *if so facts* all right, title, and interest in the said rents and profits of his or her share, if my said executors and trustees see fit and deem it proper that he or she should so lose all right, title, and interest therein, and my said executors and trustees if they deem it advisable have full power and discretion in any event and under any circumstances to divert the share of any of my children from them or any of them to the benefit their or any of their wives (or husbands) and children for and during the lifetime of such child or children whose share or shares have been so diverted. On the death of any of my said sons or daughters or upon the termination of their interest in the said property, I will and devise the interest of such to their children if any survive their parent or are alive at the termination of their estate. If they or any of them should die without issue them surviving, or if they or any of them have no children alive at the termination of their estate, then I will and devise the shares of such to my then surviving children share and share alike upon the same terms and subject to the same conditions as their own shares are willed to them . . . The executors and trustees may allow my children or any of them to occupy their respective lands. . . .

14. I would . . . suggest, L. T. Barclay, of Whitby, as solicitor.

15. Unto and to my sons Charles Edward Jones and Robert Henry Jones I will and devise the following property, viz.: To my son Charles Edward Jones I will and devise part of the frame store-house adjoining my brick hardware store as follows: he is to have the first and second flat extending from the north and south to within one foot north of the door leading from brick hardware store into said store-house and . . . all the land east of the brick store . . . for the consideration that he is to give me a free right of way three feet wide and extending south . . . To my son Robert Henry Jones I will and devise the top flat and the right of way . . . and the two bottom flats extending south. . . . For the consideration of the land east of the brick store C. E. Jones is to protect himself forever

from anything falling from the brick store roof on to his at his own expense.

16. Appointment of executors and trustees.

R. S. Cassels, K.C., for Richard Tew.

C. A. Moss, for C. E. Jones and his wife.

H. P. Coke, for the executors of Henry Jones.

H. H. Davis, for all children of testator.

E. C. Cattnach, for the infant child of C. E. Jones.

HON. MR. JUSTICE RIDDELL:—In November, 1910, Charles Edward Jones made an assignment, in the usual form, to Tew, for the benefit of his creditors; he has a wife and infant child, Dorothy.

At the time of the death, Charles E. was indebted to his father in the sum of \$2,225.49, which was charged against him; and since the death the executors have from time to time lent him money, in all \$530.49, on the agreement that the same was to be deducted from his share of the estate.

The devisees have been allowed to occupy the real estate devised to them under clause 13 of the will.

I have sent for and examined the original will; and it would seem quite plain that the testator did not write the will with his own hand, but the conveyancer (who writes a very plain hand) wrote the first ten pages, i.e., down to the suggestion to employ Mr. Barclay as solicitor, leaving blanks where now appears the word "thirteen" as the number of paragraph referred to. In clause 13 the words "if so facts" are quite plainly written and are unmistakable. The remainder of the will is written with different pen and ink, but the same as the "thirteen" and also (which was not brought to my attention upon the argument, and which may not be material) an interlineation in clause 5 (a), where "eight" thousand is changed to "seven" thousand, with an apparent corresponding change in the figures following. The words at the end of clause 10, "and to be considered as that amount paid on their shares," also appear in this pen and ink.

It would appear—though this is not certain—that it was not the same hand which wrote the two parts of the will.

1. The first question (raised by the assignee) is: "Are the devises to Charles Edward Jones contained in clause 1 absolute or are they subject to the provisions of clause 13."

It is to be observed that the operation of clause 13 is limited to the "several devises and bequests to my executors and trustees in trust for my children Charles Edward Jones, Zella Jane Jones, Florence Henrietta Evans, Eliza Sarah Amelia Jones and Robert Henry Jones."

The devises in clause 1 are not to the executors in trust at all, but direct to C. E. Jones, and consequently, these do not fall under the wording of clause 13.

Nor do I think there is any application of clause 13 by implication. The devises to Florence, Eliza and Robert Henry are explicit to the executors, etc., in trust for them, clauses 3, 4, 5—those to C. E. Jones and Zella, in clauses 1 and 2 are not. There is land which is to be converted into money (and therefore a bequest) left to the executors in trust for C. E. Jones and Zella (with others) clause 9, and that is specifically "subject to the terms and conditions of paragraph 13."

I can see no possible reason for holding that clause 1 is subject to clause 13, except that certain land in Uxbridge is left to the devisees without the intervention of executors or trustees by clause 6; but there the testator clearly intended to have clause 13 apply, although he omitted (no doubt by inadvertence) to fill in the number.

2. I cannot find authority which would induce me to believe that the specific devises to C. E. Jones are modified in any way by the expression of intention in clause 8.

3. The provision "on the death of any of said sons or daughters, or upon the termination of their interest in the said property" applies only to the property which comes under clause 13.

The other questions submitted to me are matters of administration, and I do not think an answer should be given now. If the parties cannot agree an order for administration may be applied for when all the facts can be developed, the effect of interlineations, etc., considered, and so on.

The assignee will have his costs out of the estate coming to his hands of C. E. Jones, otherwise there will be no costs.

HIS HONOUR JUDGE WIDDIFIELD. FEBRUARY 12TH, 1912.

MOLSONS BANK v. HOWARD.

3 O. W. N. 661.

*Bills of Exchange and Promissory Notes — Lien Note—Form of—
Taken by Manufacturing Company as Security for Reaper —
Possession of Reaper only Delivered to Maker Conditionally.*

WIDDIFIELD, Co.C.J., held that lien notes are not negotiable promissory notes.

Plaintiffs brought action in the Fourth Division Court of Grey County to recover \$25 and interest thereon, upon the following document.

“\$25.00. Toronto Junction, March 23, 1910.

“On or before the first day of March, 1911, for value received, I promise to pay to the Wilkinson Plough Co. Limited, or order, at their office in Toronto, the sum of twenty-five dollars, with interest at ten per cent. per annum after maturity till paid. I further agree to furnish security satisfactory to you at any time, if required. If I fail to furnish such security when demanded, or if I make any default in payment, or should I dispose of my landed or personal property, you may then declare the whole price due and payable, and you may retake possession of the implement without process of law, and sell it to pay the unpaid balance of the price, whether due or not. Subject to the aforesaid provisions, I am to have possession and use of the implement at my own risk, but the title thereto is not to pass to me until full payment of the price, or any obligation given therefor. These conditions and agreements are to continue in full force until the full payment of the price is made.”

J. O. Dromgole, for the plaintiffs.

T. H. Dyre, for the defendant.

HIS HONOUR JUDGE WIDDIFIELD:—It is admitted that the defendant is the maker of the note; that the plaintiffs became the holders thereof before maturity, for value, in good faith and without notice of any defect in title; that the defendant paid the note to the Wilkinson Plough Company, without any notice that the note had been assigned to the plaintiffs; and that the money was never paid to the plaintiffs. Upon these facts, if the

document is a negotiable promissory note, the plaintiffs are entitled to judgment; if it is not a negotiable promissory note, the plaintiffs cannot recover.

The plaintiffs contend that the document is a negotiable promissory note, and that the case is not governed by the decision in *Dominion Bank v. Wiggins*, 21 A. R. 275.

In *Dominion Bank v. Wiggins* the Court held that the following words, "The title and right to the possession of the property for which this note is given shall remain in Haggart Bros. Manufacturing Co. until this note is paid," added to the note there sued on, had the effect of rendering the document unnegotiable as a promissory note. The Court points out that, although the consideration for the note is the sale of the property, the maker has neither the title nor the right of possession thereto until the note is paid; and, unless the payee was in a position to deliver the possession of and title to the machine sold when the note matured, the purchaser was not compellable to pay, "and the payment to be made is, therefore, not an absolute unconditional payment at all events, such as is required to constitute a good promissory note."

In the present case, by the terms of the note, the defendant has the possession of the implement, and it is argued that, he having the possession and the right of possession, the title would pass to him automatically upon payment of the note, and that the hardship to which the maker is exposed in the *Wiggins* case could not happen here. Undoubtedly the Court laid considerable stress upon the fact that the defendant in the *Wiggins* case did not get either the title or possession, and that much of the reasoning proceeds upon that basis; and, if the absence of both title and right of possession was the determining factor, that is decisive as far as this case is concerned. I am, however, of the opinion that the right to possession of the machine for which the note was given remaining in the vendors, was not necessary to the decision in *Dominion Bank v. Wiggins*.

It is to be noted that, although the defendant in this case was "to have possession and use of the implement," such possession was not an absolute one, but might be revoked upon his failing to furnish security or on a sale of his property. In this respect the note is very like that in *Third National Bank v. Armstrong*, 25 Minn. 530, where the title to the implement for which the note was given remained in

the vendors, and they had "the right to take possession of said property wherever it may be found, at any time they may deem themselves insecure, even before the maturity of this note." The judgment was on an appeal from the trial Judge; and, because it disposes, very briefly, of the questions raised in the plaintiffs' argument, will stand quoting in full:—

"It appears upon the face of the instrument that the defendant's obligation to the Williams Mower and Reaper Company, the assignor of the plaintiff, was upon the sole condition and consideration that the reaper therein mentioned as belonging to the company, the possession of which was conditionally delivered to him, should by a proper transfer of title from the company, become his absolute property, whenever and as soon as the said obligation was fulfilled in accordance with the terms of the contract. It is also expressly provided that the title and ownership of the reaper should remain in the company until full payment of the so-called note and interest, and that the delivery of the property at the time was subject to this condition, and to the right of the company to retake possession at any time it might deem itself insecure. Defendant's promise, therefore, was not an absolute and unconditional one to be kept in any event; for it depended upon the contingency of an observance by the company of the sole condition on which it rested, that an absolute transfer of the property with good title would be made whenever the promise was performed. The promise of payment and the implied obligation to transfer the title were mutual; and, as each was the sole consideration for the other, and both were to be performed at the same time, they were concurrent conditions of the same agreement, in the nature of mutual conditions precedent, so that inability or refusal to perform one would excuse performance as to the other: Benjamin on Sale, pp. 451, 580. If, prior to any default on the part of the defendant, the company had retaken possession of the property and disposed of it, so that, upon the maturity of the defendant's obligation, an observance of the condition on its part had become impossible, there can be no doubt that, under such circumstances, no action could have been maintained against him upon his promise. An obligation of this character is altogether too uncertain to serve the purpose of commercial paper as the representative of money in business transactions

It carries into the hands of every holder notice of the existence of a condition that may result in defeating any recovery upon it, and, therefore, cannot have afforded to it the privileges attaching to that kind of paper."

This judgment is quoted and approved of by Hagarty, C.J.O., in *Sawyer v. Pringle*, 18 A. R., at p. 224, and by MacLennan, J.A., in *Dominion Bank v. Wiggins*, 21 A. R., at p. 278, and appears to me to be conclusive in the defendant's favour.

The action will be dismissed with costs.

Annotation by Editor.

See *Imperial Bank v. Georges* (1910), 12 W. L. R. 398, reversed in 14 W. L. R. 654, 2 Alta. L. R. 386

HON. MR. JUSTICE MIDDLETON.

FEBRUARY 15TH, 1912.

ABBOTT v. ABBOTT.

3 O. W. N. 683.

Husband and Wife — Alimony — Registered Judgment for Payment of — Petition for Order for Sale of Lands to Satisfy Judgment—Encumbrances — Execution Creditors — Creditors Relief Act—Ont. Jud. Act, s. 35—Partition Act, R. S. O. (1897) c. 123, s. 49 — Inchoate Right to Dower—Costs.

Petition by the plaintiff for an order for the sale of the defendant's lands to satisfy plaintiff's judgment against defendant for payment of alimony obtained in November, 1911, and on which no alimony had been paid.

J. E. Jones, for plaintiff's petition.

G. H. Sedgewick, for the Bank of Toronto, execution creditors, contra.

HON. MR. JUSTICE MIDDLETON:—The judgment was registered in due course under sec. 35 O. J. A., and so had the statutory effect of "a charge by the defendant of a life annuity on his lands."

This charge may be enforced without separate action by a petition in the original cause.

The judgment or order should be in form similar to the judgment in an action to enforce a charge, and should provide for sale subject to the claims of prior incumbrancers unless such prior incumbrancers consent to a sale free from their claims. Subsequent incumbrancers must be notified and be allowed to prove their claims.

It is said that the incumbrances here are executions some of which are prior and some subsequent to the plaintiff's charge. There may be some difficulty in adjusting the rights of these execution creditors in view of the provisions of the Creditors Relief Act for ratable distribution and the intervening charge.

The applicant seeks to have the order provide for a sale free from her inchoate right of dower and to provide for allowance to her of a lump sum in lieu of this right. I can find no warrant for this, and no indication that the point was considered in *Forrester v. Forrester*, cited in Mr. Holmested's book. The Partition Act, R. S. O. c. 123, s. 49, has no application to this sale.

When the matter reaches the Master's office if it appears that the executions exceed the value of the land an arrangement may be made between the plaintiff and those concerned for the surrender of her dower right, but this must be a matter of arrangement.

Something was said upon the argument indicating that the plaintiff's counsel thought she would only take in competition with the creditors ranking for the amount of past due alimony as an execution creditor. This view, if it exists, seems to me to require very careful reconsideration.

The plaintiff will have her costs of this motion and the sale out of the fund realized. Her costs up to judgment are an execution debt only.

MASTER IN CHAMBERS.

FEBRUARY 15TH, 1912.

FARMERS BANK v. HEATH.

(TWO ACTIONS.)

3 O. W. N. 682.

*Process — Service of Writ of Summons — Out of Jurisdiction —
Leave to Enter Conditional Appearance — Question as to Where
Cause of Action Arose—Place of Payment.*

These actions are brought on two policies of Lloyds made on 11th January, 1909 and 1910, respectively insuring the plaintiff against losses arising from the wrongful acts of their employees.

The plaintiff obtained the usual orders for service on the 40 or 41 defendants in London, England, and these defendants now move to have said orders and services made thereunder set aside as having been allowed without sufficient grounds.

Shirley Denison, K.C., for the defendants in both actions.

M. Lockhart Gordon, for the plaintiff.

CARTWRIGHT, K.C., MASTER:—The policies are, the first for 5,145 pounds sterling, the equivalent at \$4.86 of \$25,000, as noted on the margin of this 1909 policy under or after the seal. The second was for £5,000 only. These policies were admittedly made in London and are similar in their terms—with one exception. In the 1910 policy there is an express provision that the loss, if any, is payable in Toronto. This of course at once disposes of the motion in that action with costs to plaintiff in any event. It is only fair to state that Mr. Denison had been told by his clients that the policies were similar in all respects. As this second action must therefore be tried here and all the evidence will be found here, it may be that the defendants will prefer to have both actions tried here and at the same time. In this way expense would be saved. But in case they do not think it for their interest to take this course, then I think that the only disposition that is to be made of the motion in the 1909 case is to allow the defendants to enter a conditional appearance in the form in which the same was allowed in the case of *Burson v. German Union*, 3 O. W. R. 230-372. In the result as shewn in 6 O. W. R. 21, the plaintiff failed to shew any cause of action arising within Ontario and his action was on that ground dismissed with costs.

A similar course was approved of in *Blackley v. Elite* (1905), 9 O. L. R. 382, and *Noxon v. Jamieson* (1909), 18 O. L. R. 625. This latter case resembles the present in that the contract was silent as to the place of payment, though there "the course of business had invariably been for the respondent (plaintiff) to draw on the appellants (defendants) at sight for his commission and for the appellants to accept and pay the drafts in Scotland," per Meredith, C.J., at p. 627.

This was also the course adopted by the same learned C. J., in *Kemerer v. Watterson*, 20 O. L. R. 451, which is, I think, the latest case on the point. There the leave to enter a conditional appearance was granted because it was in doubt whether, if the contract was made in Quebec, payment was nevertheless to be made in Ontario. The decision of the Chancellor in *Canada Radiator v. Cuthbertson*, 9 O. L. R. 126, was expressly approved of by Meredith, C.J., in *Kemerer's case, supra*, at p. 454.

In view of the facts of this case and of the above authorities, I have not thought it useful or necessary to discuss the grounds urged in support of the motion by Mr. Denison in his full and clear argument, which may hereafter enable him to get at least the same measure of success as the defendants secured in *Burson v. German Union, supra*.

The defendants may satisfy the Court on a full consideration of the case at the trial, that payment was to be made in London under these policies; unless there is an express agreement to the contrary as is found in the policy for 1910, which was only for £5,000 and not for £5,145, the amount secured by the one now in question.

But this requires evidence which cannot be given or considered on an interlocutory application. Mr. Denison also asked for extension of time for delivery of statement of defence. When present motion first came on 12th January, it was enlarged at his request for a month on condition that no further time should be given for this purpose, after the motion itself was disposed of. But very likely the plaintiff will not object to any reasonable extension. This can be determined on the settlement of the order giving leave to enter conditional appearance.

The motion is otherwise dismissed with costs in the cause.

COURT OF APPEAL.

FEBRUARY 15TH, 1912.

KLINE BROS. v. DOMINION FIRE INS. CO.

3 O. W. R. 698; O. L. R.

Insurance — Fire — Goods Destroyed on Premises Described in Policy — Had been Transferred to Other Premises — Later Re-transferred to Original Premises.

COURT OF APPEAL affirmed judgment of Sutherland, J., 18 O. W. R. 876.

An appeal by the plaintiffs from a judgment of HON. MR. JUSTICE SUTHERLAND, 18 O. W. R. 876, who dismissed the action.

The action was brought to recover the sum of \$2,000 upon an insurance policy issued by the defendants in favour of the plaintiffs, whereby the defendants agreed to insure the property of the plaintiffs contained in a building at the city of Quincy in the State of Florida, for one year, against loss by fire.

The appeal to the Court of Appeal was heard by HON. SIR CHAS. MOSS, C.J.O., HON. MR. JUSTICE GARROW, HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MEREDITH and HON. MR. JUSTICE MAGEE.

L. G. McCarthy, K.C., and Frank McCarthy, for the plaintiffs, appellants.

H. Cassels, K.C., for the defendants, respondents.

HON. MR. JUSTICE GARROW:—The facts are set out very fully in the judgment of Sutherland, J., and as I agree in the result, I do not think it necessary to repeat them at any length.

As will be seen, Sutherland, J., in dismissing the action proceeded upon two main grounds: (1) the absence of authority in Mr. Schekira, the clerk in the defendants' New York agents' office, to consent for the defendants to a transfer, or even to issue a "binder," and (2) that the consent to the transfer obtained at the defendants' head office at Toronto after the fire could not be upheld, it having been given in ignorance that a fire had occurred.

The second conclusion seems to be undoubtedly correct. The fire had completely altered the relation of the parties, and had fixed their respective rights and obligations under the contract as it then stood: see *Skillings v. Royal Ins. Co.*, 6 O. L. R. 401, at p. 405. That the consent was antedated is, I think, of no consequence. The defendants cannot under the circumstances be assumed to have intended thereby to ratify the "binder" issued by Mr. Schekira, of which upon the evidence it is clear they then knew nothing.

As to the other ground, I have had more difficulty. The defendants' agents, Dickson & Tweedale, consented to the earlier transfer, with the apparent approval of the defendants. That transfer was put through the agents' office by Mr. Clark, an employee, and initialled upon its face by him, and not by the agents themselves or either of them. This the defendants must be assumed to have known when they received particulars of the transfer on December the 4th following. Nor does Mr. Massie, the defendants' president, when called as a witness, disapprove of what was then done, either by the agents or by Mr. Clark as their employee. There is no evidence that Mr. Clark was appointed in writing. So far as appears he may have been appointed exactly as Mr. Schekira was. When Mr. Clark left the employment Mr. Schekira, who had acted as Mr. Clark's assistant, continued to discharge his duties with respect to such transactions, which were not at all unusual. Mr. Schekira had so acted for several weeks before the date of the "binder" in question, and had in that time put through several for the other companies represented by Dickson & Tweedale, although this happened to be the first for the defendant company. That he was so acting must have been known and approved by Dickson & Tweedale, who, if they did not expressly appoint him to succeed Mr. Clark, at least did not appoint anyone else to do so.

The case is not, I think, governed by the case in this Court of *Walkerville Match Co. v. Scottish Union*, 6 O. L. R. 679. That was the case of a small local agency. This is the case of a single exclusive agency doing a large business, in a foreign jurisdiction, for it is not shewn that the defendants had any other agent in or for the city, or even for the State of New York. Such an agency has been not unreasonably held in this province to stand, as to its authority to bind its principals, at least in some respects, in the position of the head office: see *Campbell v. National Ins.*

Co., 24 C. P. 133, at page 144. In such an office in a great city like New York, and in an office doing the extensive business done by Dickson & Tweedale, it could not reasonably be expected that the agents would do everything personally. But what would be expected, and what would be reasonable it seems to me, would be that the business while carried on under their general supervision would be managed, as to details, with the aid of subordinates such as was Mr. Clark, and after him, Mr. Schekira. And a policy-holder acting in good faith would not I think be bound to see that such subordinates had been duly or efficiently appointed if they were apparently acting within the scope of an ostensible authority. The plaintiffs had dealt in a similar manner with one subordinate, Mr. Clark, with the apparent approval of the defendants, and I incline to think they were equally justified in the subsequent dealing with Mr. Schekira who, although a young man and less experienced than Mr. Clark, was apparently performing the same duties in the agents' office with respect to such transactions as the one in question.

I am also of the opinion that the secret cancellation of the agent's authority does not affect the matter. Such agencies cannot be terminated in that summary way to the prejudice of customers who continue to deal with the office in good faith and without notice.

In the result the "binder" in my opinion should be regarded as if when it was given, Dickson & Tweedale had continued to be the defendants' agents and had themselves given it.

But this by no means ends the plaintiffs' difficulties. The "binder" it is clear upon the evidence is only intended to be in force pending the production of the policy and a proper endorsement thereon of the change in the contract. The policy contains a provision that no officer or agent shall have power to waive the provisions or conditions of the policy, unless such waiver is written upon or attached to the policy, and that no privilege or permission affecting the insurance under the policy shall exist or be claimed by the insured unless so written or attached. Granting the temporary "binder" seems to have become a practice not actually warranted by the usual contract of insurance, owing to the exigency of the haste with which business is now transacted. But it is clear, and it is not unreasonable, that the formal completion should in the interests of both parties, take place without unnecessary delay. No actual time for

doing so is stated, either in the "binder" or by the witnesses who describe the practice. The assured holds the policy. The next step must therefore come from him. He would be bound to produce the policy to the assurer for the purpose of having the further formal endorsement made. And this I think he would be bound to do within a reasonable time: see *Scammell v. China Mutual Ins. Co.*, 164 Mass. R. 341, and *Thompson v. Adams*, 23 Q. B. D. 361, where cognate subjects are discussed. What is a reasonable time is, of course, a question of fact, and with every desire to put no unnecessary obstacle in the plaintiffs' way in seeking to recover what appears to be an honest claim, I find it quite impossible to hold that they, and those for whom they are responsible, acted otherwise than with great, unnecessary and inexcusable delay. Ring & Co., their agents, at New York, knew before the end of January that Dickson & Tweedale had through financial difficulties been closed up. That was matter of newspaper notoriety. They must have known where the head office was, and might have applied there, but did not. On March the 7th they handed to Mr. Stinson at Niagara Falls, an insurance agent residing in Toronto, the policy and formal transfer to obtain from the defendants at their head office the necessary endorsement, which, as subsequent events shewed, could have been easily obtained; but, for some wholly unexplained reason, Stinson & Co. did nothing until the day after the fire. The result is that through no fault of the defendants the requisite endorsement upon the policy was not made in time. And they are therefore now in a position, successfully in my opinion, to set that up as a defence to the action.

The appeal should in my opinion, be dismissed with costs.

HON. SIR CHAS. MOSS, C.J.O., HON. MR. JUSTICE MACLAREN and HON. MR. JUSTICE MAGEE concurred.

HON. MR. JUSTICE MEREDITH:—An insurance of goods in one building or locality is not an insurance of them in another building or locality; the removal of them from one place to another requires that which is tantamount to a new contract in order to preserve the insurance: see *Pearson v. Commercial Union Ins. Co.*, 1 App. Cas. 498.

The goods in question were moved from the place and building in which they were insured to another place and building and were there destroyed by fire; and, therefore,

the plaintiffs can recover in this action, upon the policy of insurance, only if they had procured, before the fire, that which was tantamount to insurance of the goods in the place and building where they were so destroyed.

They took steps with that object in view; but had not, in my opinion, accomplished it when the fire took place.

Their first step was, through their agents, an application to a co-partnership firm in the city of New York who had been the New York agents for the defendants, but had some time before ceased to be their agents, and were in difficulties which brought their business to a close soon after; the application was made in writing upon a form, called a "binder," which, upon its face, is singularly inappropriate; being in the form of an application for insurance which form, when accepted, becomes that which is in this province always called an "interim receipt," constituting a binding contract of insurance subject to the conditions of the policy to be issued upon it. But no premium or consideration was given, nor any readjustment in any respect attempted, so that it is quite plain that all that ought to have been sought, and given, was the assent of the company to change of the locality of the goods insured; and the main difficulty I find in the plaintiff's way to success in this action is that that was not done, and the defendants cannot be bound, especially on the facts of this case, by intentions or by what ought to have been done, not carried into effect.

The application was presented to a young man who was at the time in charge of that branch of the New York firm's business to which the application would in the ordinary course of business be made, but he was little experienced, and the business was, as I have intimated, in a stage approaching collapse. Without enquiry, except to see that the application came from a reputable insurance broker, and who, without consulting anyone else in the office, initialled the application, which the broker retained, and placed another, I suppose a duplicate, "on the fyle in the office" of his master's.

While the same policy was in force, another change of locality of the goods had taken place previously, and had been duly assented to by the defendants: the change in question was a removal of the goods back to the place where they were when the insurance upon them was first effected. On this occasion the procedure adopted seems, from the evidence, to have been of a different character: according to the testimony of the broker on the first occasion, an en-

dorsement of the policy giving consent to the change was drawn by him, signed by the company through their New York agent, and attached to the policy by him, and returned to the plaintiffs. But, however, this may be, when consent to the second change was sought, all concerned—the brokers and the New York firm's clerk both say so very plainly—that the endorsement upon the policy could not be made by the New York firm, that, at that time at all events, it must be procured from the defendants, as it afterwards was, but not until after the loss.

Assuming, as I do, that in the circumstances of this case the plaintiffs might deal with the New York firm, as they did, as if still agents of the defendants, because no notice of their discharge had been given, I am yet unable to perceive how it can rightly be found that any consent of the defendants to change of locality had been obtained before the loss. Whatever the persons concerned intended to do or should have done, no such consent was actually given; all that was done was the presenting of the application in writing and the initialling of it, and placing it upon the file, as I have mentioned, by the New York firm's clerk; no endorsement was made; the character of the "binder" was on its face entirely different from that of the endorsement which had previously been obtained, and which would be the usual mode of evidencing consent to such a change; and no knowledge of the change came to the defendants until late in the month of March, more than three months after the "binder" transaction took place; and, as I have before intimated, the New York firm, having actually no sort of authority to act for the defendants at that time, ought not to be given any binding power, by reason of any ostensible power, beyond that which they actually exercised; which is in writing, and which was exercised only through the ignorance of their clerk.

As the plaintiffs' claim seems to me morally a just one, that is, they have through misfortune only lost their goods, one may regret that they should also lose their indemnity through nothing but want of ordinary care and business method; but I am quite unable to perceive how it can justly be said that before the loss they had obtained a binding consent of the defendants to the change of locality of the goods, the burden of proof of which is upon them; and if that be so they rightly failed, in this action at the trial.

Appeal dismissed with costs.

COURT OF APPEAL.

FEBRUARY 15TH, 1912.

BRITISH NORTH AMERICAN MINING CO. v.
PIGEON RIVER LUMBER COMPANY & FRED
J. SMITH.

3 O. W. N. 701.

*Trespass to Lands — Cutting Timber — Logs — Pulp Wood —
Action for Re-possession.*

COURT OF APPEAL affirmed judgment of Sutherland, J., 17
O. W. R. 575.

An appeal by the defendants from a judgment of HON.
MR. JUSTICE SUTHERLAND, 17 O. W. R. 575, in favour
of the plaintiffs.

The appeal to the Court of Appeal was heard by HON.
SIR CHARLES MOSS C.J.O., HON. MR. JUSTICE GARROW,
HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MERE-
DITH, and HON. MR. JUSTICE MAGEE.

I. F. Hellmuth, K.C., and C. A. Moss, for the defendants,
appellants.

L. G. McCarthy, and Frank McCarthy, for the plaintiffs,
respondents.

HON. MR. JUSTICE GARROW:—The plaintiff is a mining
company incorporated by special Act in the year 1847
(amended by 9-10 Edw. VII: (Dom. ch. 69)). having its
head office at the city of Montreal and owned a parcel of
land about ten square miles in extent known as Princes loca-
tion in the district of Thunder Bay. Upon this land the
statement of claim alleges that the defendants had tres-
passed and cut therefrom a large quantity of pulpwood
amounting to about 2,500 cords, which they had removed
from the land and caused to be floated in the Jarvis river,
where it was when the action commenced, that the plaintiffs
on June 16th, 1910, demanded possession of and the return
of such pulpwood; and that the defendants deny the title
of the plaintiffs thereto, and refuse to give up possession
thereof or to return the same. And the plaintiff claimed
a declaration as to the title to such pulpwood, an account,
damages, a return of the pulpwood and an injunction.

The defendants appeared by the same solicitors but set up separate defences. The defendants, the Pigeon River Co. pleaded that they purchased the pulpwood from the defendant Smith, who had a title thereto under a contract in writing made with one Spittal, the authorized agent of the plaintiff; that they found such contract registered in the registry office for the district of Thunder Bay on the plaintiffs' lands, and purchased the pulpwood in good faith, and were innocent purchasers for value without notice; and other matters by way of defence which need not be set out.

The defence set up by the defendant Smith was of similar purport in so far as the origin of his alleged title to the pulpwood was concerned which he derived through the contract in writing referred to by his co-defendant. He further pleaded that the plaintiff is estopped by the conduct of its officers; claimed by way of set off certain allowances for work done for the plaintiffs; alleged that in repudiating the action of their agent Spittal this defendant had suffered loss, damage and expense in consequence of his failure to perform his contract with his co-defendant for the supply of pulpwood. And by way of counterclaim, he asked to recover from the plaintiff \$4,800 for monies expended and improvements made upon the plaintiffs' lands, and \$2,000 for damages because of the interference with his right to cut wood on the plaintiffs' lands.

There were also subsequent pleadings in which the defendants charge fraud if the plaintiff repudiates or had not authorized Spittal to enter into the contract under which the defendants claimed. And the plaintiff asks that the contract which had been registered should be set aside and declared null and void.

At the trial although a considerable amount of extraneous matter was introduced, it was quite obvious as Sutherland, J., more than once remarked during its progress, that there was really but one main question to be tried, namely, Spittal's authority. After hearing all the evidence, the learned Judge held that Spittal had no authority; that the plaintiff was entitled to the pulpwood, which had while the action was pending been sold, by consent, and the proceeds paid into Court; that the instrument executed by Spittal which had been registered (but after and not before the defendants the Pigeon River Lumber Co. purchased from the defendant Smith) was and should be declared to be null

and void, and set aside; that the defendants should be restrained from further trespassing; and as to the counter-claim of the defendant Smith, that the claim of the plaintiff for trespass beyond the recovery of the pulpwood and the claim of the defendant, Smith, should be set off the one against the other.

I agree with the conclusions of Sutherland, J., who in his judgment sums up the result of the evidence so fully and so fairly that I am afraid I can add but little, usefully, to what he has said.

That the pulpwood had been cut and removed by the defendant Smith from the plaintiffs' lands no one disputed. The title of the defendant the Pigeon River Lumber Company under the circumstances wholly depended upon whether or not the defendant Smith had acquired a good title as against the plaintiff by the instrument called in the statement of defence a contract in writing, dated October 25th, 1909. This instrument when produced at the trial turned out to be something more than a mere contract in writing, namely, a co-called Indenture under seal. The parties to it are the plaintiff, described as the "vendor," and Fred J. Smith, lumberman, described as "the purchaser." And it professes, on the part of the plaintiff, to agree to sell to the purchaser "all spruce and balsam trees and timber now standing, growing or being" on the whole of the plaintiffs' before-mentioned parcel of ten square miles, at the price of fifty cents per cord. The testatum clause is as follows, "In witness whereof the parties hereto have hereunto affixed their hands and seals the day and year first above written."

"In the presence	{	"The British North American Mining Co. (Seal.)
A. H. Dowler."	{	F. J. Smith (Seal.) Per C. D. Spittal, Manager (Seal.)

The plaintiff denied that this instrument, which was not under its corporate seal, was its deed or executed with its authority; the contrary of which the defendants attempted to prove by the production of the writing under which Spittal was appointed, which writing was as follows:—

Montreal, August 11th, 1909.

To whom it may concern:

Mr. C. D. Spittal, whose signature subjoins, is authorized to mine and explore all the properties of the British North

American Mining Company." Namely: Prince Location, Spar Island and Mink Island, &c., and to act for and take such action or actions as he may consider necessary in the interest of the company.

The British North American Mining Co.,

G. Durnford,

Vice-President.

Geo. Bonner.

Secretary.

Signature,

Chas. D. Spittal.

But to its sufficiency there is clearly more than one obvious objection.

The plaintiffs' Act of Incorporation (Clause 13) contains specific directions as to the mode in which the corporation may execute instruments under its corporate seal. Such directions require, in addition to the corporate seal the signature of the president or of any two directors, and that the instrument should be countersigned by the secretary. But quite apart from these statutory requirements, it is clear upon general principles that an agent appointed by parol cannot bind his principal by deed: see *Berkeley v. Harding*, 5 B. & C. 355; *Powell v. London & Prov. Bank*, [1893] 2 Ch. 555; *Hobblewhite v. McMorine*, 10 M. & W. 200.

In addition, and apart from any question of the mere form of the contract, the document by which Spittal was appointed, in my opinion conferred no authority whatever upon him to enter into a transaction such as the one in question. He was appointed and employed to "mine and explore," and nothing else so far as appears, and the general words in the latter part of the document are and should be limited by construction to the particular employment mentioned in the first part of it: see *Harper v. Godsell* L. R. 5 Q. B. 422; *Jacobs v. Morris*, [1902] 1 Ch. 816. It is not easy to see how a person employed to mine and explore could by reason only of that employment justify selling any part of his employers' property, much less enter into a contract of the magnitude and importance of the one in question.

Efforts, which in my opinion quite failed, were also made by the evidence to extend and enlarge Spittal's authority beyond that contained in his written appointment. For this

purpose reliance was chiefly placed upon a letter said to have been written to Spittal by the plaintiff saying among other things that "buying the machinery and selling the pulpwood would be taken up when he (Spittal) went to Montreal." The plaintiff by its witnesses says that no such letter was ever written. It was not produced at the trial nor very satisfactorily accounted for. But the letter itself, even accepting all that the evidence shews of its contents, was wholly insufficient to add to Spittal's previous written authority. Indeed if anything it goes to support the plaintiff's contention that Spittal never had, nor ever was intended to have such authority, and was if he was corresponding about it at all, which the plaintiff denies, asking to be granted such authority.

Efforts equally futile and without sound foundation were also made to set up a case of estoppel by conduct because one or more of the plaintiff's directors are said to have become aware of the sale by Spittal to the defendant Smith, and particularly that Col. Hamilton, a director, had about the last of April or the first of May, 1910, been shewn what purported to be the agreement of sale, or a copy of it, in the hands of a solicitor at Fort William. Col. Hamilton, however, lost no time on his return to Montreal in informing his fellow-directors of what he had seen, and the plaintiff's solicitors were at once instructed to take the necessary steps to protect the plaintiff's interests. Col. Hamilton appears to have acted in the premises with a wise business discretion, in not at once making an outcry which might have had disastrous consequences to the plaintiff's other and very much larger interest involved in the mining operations then proceeding, which were entirely in charge of Spittal. Col. Hamilton after all was only one of several directors, and had no particular charge or management of the property, which on the occasion in question he was visiting chiefly by way of recreation, and not as a matter of business. Such a foundation is, under the circumstances, quite too slender upon which to build a case of estoppel, and like all the other defences set up must fail.

The plaintiff was entitled to follow the pulpwood itself, as by the pleadings it claimed to do, and Sutherland, J., accordingly quite correctly applied the principle laid down in this Court, affirmed in the Supreme Court, in the very

similar case of *Faulkner v. Greer*, 16 O. L. R. 123, 40 S. C. R. 399.

The appeal, in my opinion, wholly fails and should be dismissed with costs.

HON. SIR CHAS. MOSS, C.J.O., HON. MR. JUSTICE MACLAREN and HON. MR. JUSTICE MAGEE concurred.

HON. MR. JUSTICE MEREDITH:—The trial Judge reached, I am quite sure, a right conclusion in this case; and reached it by the right way. The plaintiffs are suing to recover pulpwood which unquestionably was theirs, and still is unless the defendants have acquired title to it under them; or else they are in some way prevented asserting title to it against the defendants.

The defendants' attempt to prove title in themselves, under a sale of it by the plaintiffs to one Smith and by him to them, quite failed for want of authority in Spittal to bind them in the sale he made of it, as standing wood, to Smith. Spittal's authority was in writing and did not extend to a sale of the plaintiffs' lands or any part of them; but was limited, as the trial Judge considered, to mining and exploring the lands, and all things that he might consider in the interests of plaintiffs in connection therewith. The sale of the wood had not any sort of connection with such mining or exploring; and, though it may not materially affect the legal question, I may add that Spittal's authority, in this respect, was questioned before the sale to Smith and in that transaction, and also in the subsequent transaction between Smith and the defendants; and, that both seemed to recognize, and to act upon the recognition, that something more than the written authority was needed to make the sale valid; and yet neither took the least reasonable precaution to make sure of his power; so that the case looks to me like the too common one in such localities of taking chances, and, if anything turns up, as perhaps is too frequently not the case, of "bluffing it through."

The defendants quite failed to prove anything in the shape of a contract depriving the plaintiffs of their property in the pulpwood; and I can find nothing like a ratification by the defendants on the unauthorized sale, in the evidence adduced at the trial.

Then the extraordinary contention was made that the plaintiffs were taking advantage of the fraud of their agents, in bringing this action, and that the law would not permit them to do that; but, in truth, is not the boot on the other foot; is it not the defendants who are seeking to take advantage of the fraud of this person? If the plaintiffs had accepted, and retained, the price of the pulpwood, there might be something in the contention; but as the facts are it seems to me to have no sort of weight or application.

The third point is that the plaintiffs cannot have their own property back again, but must be content with damages assessed at the actual value of the wood, "on the stump" at the time it was cut; that is, that the defendants may dictate the character of the action which the plaintiffs shall bring; and that one may strip the land of another of its timber—which is not, like coal, a dead thing—and satisfy the wrong with the market price of the property taken: see *Faulkner v. Greer*, 16 O. L. R. 123; 40 S. C. R. 399.

I would dismiss the appeal.

Appeal dismissed with costs.

COURT OF APPEAL.

FEBRUARY 22ND, 1912.

IRISH v. SMITH.

3 O. W. N. 711.

Mines and Minerals — Interest in Claim — Application of Ontario Mines Act, s. 91 — S. 94 Defines "Otherwise Agreed"—Takes Case out of Act — Subscription Money Expended — Liability to Account.

COURT OF APPEAL affirmed judgment of Divisional Court, 19 O. W. R. 529; MEREDITH, J.A., dissenting.

An appeal by the plaintiff from a judgment of a Divisional Court, 19 O. W. R. 529, reversing an order of the Mining Commissioner whereby he directed the defendant to pay \$612.36 within 30 days, or in default that his interest in the three unpatented mining claims in the Larder Lake Mining District in which the plaintiff and defendant were

jointly interested should be forfeited. The order was made under section 81 of the Mining Act, 8 Edw. VII. ch. 21, which provides: "Where two or more persons are the holders of an unpatented mining claim, each of them shall contribute proportionately to his interest, or as they may otherwise agree between themselves in the work required to be done thereon. In case of default by any holder the Commissioner upon the application of any other holder and upon notice to and after hearing all persons interested, or such of them as appear, may make an order vesting the interest of the defaulter in the other co-owners upon such terms and conditions, and in such proportions as he may deem just." "The work required to be done" of course refers to the compulsory work necessary to enable the claim to be held: see section 78.

The learned Mining Commissioner found in favour of the claimant, but was reversed by the Divisional Court, Middleton, J., delivering the judgment of the Court. The matter had, in another form but upon practically the same evidence and the same facts, been before that learned Judge upon the trial of the action brought by the claimant to set aside the transfer to the defendant, which was dismissed.

The appeal to the Court of Appeal was heard by HON. SIR CHARLES MOSS, C.J.O., HON. MR. JUSTICE GARROW, HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MEREDITH, and HON. MR. JUSTICE MAGEE.

E. S. Wigle, K.C., for the plaintiff, appellants.

A. B. Drake, for the defendant, respondent.

HON. SIR CHARLES MOSS, C.J.O.:—I am of opinion that the order of the Divisional Court should be affirmed.

The real question as it appears to me is, not whether the parties varied or agreed to vary the proportions in which they were answerable the one to the other for contribution to the work required to be done on their mining claims, but whether upon the facts and circumstances appearing Smith did not contribute to the work to the same extent and in the same manner as Irish. The theory of the claim was that Smith had agreed to contribute all that was required. But the learned Mining Commissioner did not so deal with the matter by the order he pronounced. He dealt with it as if

there was no agreement varying the proportions, but has found that Smith did not contribute any part of the money which went into the work. It is not pretended by Irish that the money which did go in was other than the money contributed by persons who were induced to do so upon an agreement or understanding that they were to be recouped out of the joint property either by shares in a company or out of the proceeds of a sale of the claims if one was made. Smith took an active part in forwarding the scheme agreed upon between him and Irish for thus procuring the funds, and it is not possible to separate by evidence of contributors the relative efficacy of the varying influences which led them to contribute their moneys. They knew of Smith's position with reference to the properties and they also knew that he was actively concerning himself with procuring their entry into the enterprise. The moneys provided in this way naturally went into Irish's hands as the owner who was to see to the performance of the required work, but it did not thereby become his money. It was the money of all interested and so Smith's as much as Irish's. The latter ought not now to be permitted under pretence of being himself solely liable to the contributors to ask to be treated as the sole contributor to the work and that Smith be deemed a defaulter subject to the extreme penalty imposed by section 81 of the Mining Act of Ontario, 8 Ed. VII. ch. 21.

The appeal must be dismissed with costs.

HON. MR. JUSTICE GARROW:—The questions involved are almost entirely questions of fact. I would have said, entirely so, but for the reference in the judgment of Middleton, J., to the "agreement" of which I may as well say what I have to say, at once.

The section, *prima facie*, imposes the liability equally upon the holders of the several interests in proportion to their shares. But they may by agreement vary such proportions, in which case the agreement and not the proportion fixed by statute would govern. The statutory obligation and the statutory lien, however, would, even in that case, remain. So that a default in performing the proper share, as varied and apportioned by the agreement, would have the same result in leading to a forfeiture as would a default where no agreement had been made. But I see no evidence of any such agreement in this case. The only agreement spoken

of was one which had for its object merely the mode of raising the money to be expended in doing the development work, and in no way altered or varied the proportion of such work which each co-owner was by the statute compelled to do. The judgment of Middleton, J., however, does not I think depend to any extent upon his remarks respecting the agreement, but upon his conclusion upon the main question of fact—that is, whether the claimant had with his own hands, or by the expenditure of his own money done or had work done upon the claims in question in excess of his own proper statutory share. It was not claimed that the work had been personally done by the claimant. What he did claim was that he had procured it to be done, and in so doing had expended his own money, an issue found against him by Middleton, J., who in his judgment in the Divisional Court says: “Neither owner has expended any money of his own, and both are accountable to subscribers for the money received.”

This conclusion was based upon the evidence, which consisted chiefly of the testimony of the parties themselves who are both described as unsatisfactory witnesses, an opinion of them which receives some confirmation in the judgment of the learned Commissioner, although he considered the “merits” to be with the claimant, and found in his favour. The only “merits” I can see in such a case is reasonable evidence of the facts which alone would create the special lien given by the statute. In the absence of such evidence there can be no merits in the judicial sense, even with the aid of section 140, to which the learned Commissioner refers, which requires him to give his decision in matters coming before him “upon the real merits and substantial justice of the case.”

Upon the whole, and for the reasons I have given, I agree with the conclusion of the Divisional Court and think the appeal should be dismissed with costs.

HON. MR. JUSTICE MACLAREN, and HON. MR. JUSTICE MAGEE agreed.

HON. MR. JUSTICE MEREDITH (*dissenting*):—I prefer the view of this case taken by the Mining Commissioner to that of the Divisional Court.

It is quite obvious that nothing agreed to between the parties to this action could absolve them from the perform-

ance of the work in question which, section 78 of the Mining Act of Ontario imposes, if forfeiture of the mining claim, under section 84, is to be avoided. Then under section 81, each of the parties was and is bound to contribute "proportionately to his interest, or as they may otherwise agree among themselves" in the performance of that work. Why then, the interest of each being a moiety, should the respondent not contribute one-half?

It is said, because the parties, not having the means, agreed between themselves that the money required for such work should be obtained, if possible, from prospective shareholders in a company to be formed to take over this mining property. But I am unable to understand why that should relieve the respondent altogether; why it should permit him to play the part of a drone. His obligation may perhaps be met with money procured by him in that way and applied in doing the required work; but, short of that, I cannot perceive how he can rightly escape altogether the statute imposed obligation to do his share.

There is nothing in the literal meaning of the words of section 81 which helps the respondent's contention that he is relieved altogether from the obligation to contribute; it provides that each shall contribute to the work proportionately to his interest, or as they may otherwise agree among themselves, that is, agree as to contribution, and there can be no contribution when one, or other, or each, is to contribute nothing; and the Commissioner's ruling is quite in accord with "the real merits and substantial justice of the case"—section 140—whilst that of the Divisional Court is not. The case is one plainly within section 81, and the onus of bringing himself within the exception, or alternative, contained in it, rests upon him—and, to say the least of it, that has not been done.

In short I can find nothing in any agreement between the parties relieving the respondent from his duty to contribute his moiety, if required to do so by his co-holder of the unpatented mining claim; even if, in such a case as this, he could be altogether so relieved; and it is quite plain that there was no intention on the part of either party that he should be relieved of all obligation in that respect.

I would restore the order of the Commissioner, whose great experience in mining matters gives much weight to his rulings.

Appeal dismissed with costs, MEREDITH, J.A., dissenting.

HON. MR. JUSTICE MIDDLETON.

FEBRUARY 17TH, 1912.

HEWITT ALLAN CO. v. ADAMS.

3 O. W. N. 750.

Injunction — Interim — Motion by Plaintiff for an Injunction Restraining Defendant from Disposing of Certain Hay until Trial — Middleton, J., held Damages to be Proper Remedy.

J. Grayson Smith, for the plaintiff's motion.

W. E. Raney, K.C., for the defendant, contra.

HON. MR. JUSTICE MIDDLETON:—Upon further consideration, I can see no reason to change my mind. The case appears to me to be one in which damages are the appropriate remedy, and that there is no title in the plaintiff to the specific hay. So that the parties may not be prejudiced, I do not now determine this, and enlarge the motion to the trial, which, as arranged and as now directed, is to take place at the Brockville sittings on 12th March—and make no order meanwhile.

MASTER IN CHAMBERS.

FEBRUARY 21ST, 1912.

CRUCIBLE STEEL CO. v. FFOLKES.

3 O. W. N. 750.

Judgment Debtor — Examination of Transferee of Land in Manitoba — Transferee Declined to Give Evidence — Motion for Full Discovery — Construction of Con. Rule 903 — Lands not Exigible under Execution Issued in Ontario — No Evidence that it was Exigible under Laws of Manitoba—Motion Dismissed.

The plaintiffs, as judgment creditors of the defendant, obtained an order under Rule 903, for the examination of an alleged transferee from the defendant.

On examination it appeared that the only transfer was of land in Manitoba. As to this the transferee declined to give any evidence, alleging that it is not "exigible under execution" within the meaning of the Rule. The plaintiffs have moved to have him ordered to make full discovery.

Harcourt Ferguson, for the motion.

J. H. Spence, contra.

CARTWRIGHT, K.C., MASTER:—There was no contention that land in Manitoba is exigible under an execution issued in Ontario. Nor is there any evidence that it is exigible in such a case under the laws of Manitoba. On this short ground the motion fails and must be dismissed with costs, fixed at \$20. See *Canadian v. Wheeler*, 3 O. L. R. 210.

While Rule 903 is, no doubt, to be construed so as to advance the remedy (see *Gowans v. Barnett*, 12 P. R. 330), yet this is only to be done so far as the fair meaning of the words will permit. To carry it to the length now suggested would be legislation and not merely interpretation.

MASTER IN CHAMBERS.

FEBRUARY 21ST, 1912.

GUEST v. LINDEN.

3 O. W. N. 750.

Mechanics' Lien — Proceeding to Enforce — Defendant Failed to Appeal — Motion to Set Aside Judgment of Official Referee Dismissed by Master-in-Chambers — No Jurisdiction to Set Aside Judgment—Con. Rules 42 (17d), 778.

This is a proceeding under the Mechanics' Lien Act, in which a motion is made by the defendant to set aside a judgment given by an Official Referee on a trial before him at which the defendant did not appear.

T. Hislop, for the motion.

R. D. Moorhead, contra.

CARTWRIGHT, K.C., MASTER:—It was objected that I had no jurisdiction to entertain the motion. Rule 42 defines the powers of the Master in Chambers, and clause (d) of subsec. 17 of that Rule excepts from his jurisdiction "staying proceedings after verdict or on judgment after trial or hearing before a Judge." No mention is made of setting aside such a judgment in any case, even by consent. If the

defendant here has any remedy, it would seem to be under Rule 778. The power given thereby could probably be exercised in a proper case by the Official Referee. See sec. 34 of the Act. Here the ground of attack is that no written notice of trial was served, as required by the Act. It will be for the Referee to say whether it was, and, if so, what relief should be given to the defendant.

The motion will be dismissed with costs, fixed at \$10, to be added to the plaintiff's claim.

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DECEMBER 6TH, 1911.

MARY GRIFFITH v. GRAND TRUNK R.W. CO.

S. C. R.

ON APPEAL FROM COURT OF APPEAL FOR ONTARIO.

*Negligence—Railway Company—Death from Contact with Train—
Absence of Eye Witness—No Warning at Crossing—Findings of
Jury—Reasonable Inferences—Balance of Probabilities.*

About 5.30 on a December afternoon, G. left his place of employment to go home. An hour later his body was found some 350 yards east of a crossing of the Grand Trunk Railway, nearly opposite his house. There was no witness of the accident, but it was shewn on the trial of an action by his widow and children, that shortly after he was last seen an express train and a passenger train had passed each other a little east of the crossing, and there was evidence shewing that the latter train had not given the statutory signals when approaching the crossing. The jury found that G. was killed by the passenger train, and that his death was due to the negligence of the latter in failing to observe the statutory duty to whistle and ring the bell, and negatived contributory negligence.

MIDDLETON, J., 17 O. W. R. 509, 2 O. W. N. 252, entered judgment for plaintiff for \$2,000 and costs as awarded by the jury.

COURT OF APPEAL, 19 O. W. R. 53, 2 O. W. N. 1059, dismissed defendant's appeal with costs; MEREDITH, J.A., dissenting, being in favour of granting a new trial.

SUPREME COURT OF CANADA *held*, that the jury were justified in considering the balance of probabilities and drawing the inference from the circumstances proved, that the death of G. was caused by such negligence.

Judgments of above Courts affirmed.

An appeal by the defendants from a judgment of the Court of Appeal for Ontario, 19 O. W. R. 53, maintaining a judgment of HON. MR. JUSTICE MIDDLETON, 17 O. W. R. 509, in favour of the plaintiffs at the trial.

The material facts are stated in the judgments previously reported.

The appeal to the Supreme Court of Canada was heard by HON. SIR CHARLES FITZPATRICK, C.J.C., HON. MR.

JUSTICE IDINGTON, HON. MR. JUSTICE DUFF, HON. MR. JUSTICE ANGLIN, and HON. MR. JUSTICE BRODEUR.

D. L. McCarthy, K.C., for the appellants.

W. M. McClemon, for the respondents.

HON. SIR CHARLES FITZPATRICK, C.J.C.:—Assuming that Griffith was run down, as found by the trial Judge, at the level crossing on Kenilworth avenue, he was there in the exercise of his right to cross the railway at a place made and provided by the company for that purpose. A train of cars comes to the same place with a right to cross that highway, subject, however, to the statutory duty of observing certain precautions with respect to the use of the bell and whistle. There was failure to perform that statutory duty. The bell was not rung and an accident resulting in the death of the deceased happened. There can be no doubt that, on these facts, a jury might say that negligence on the part of the company ought to be inferred. *Grand Trunk Rv. Co. v. Hainer*, 36 S. C. R. 180; *North Eastern Rv. Co. v. Wanless*, L. R. 7 H. L. 12.

The answer of the company is that the deceased was also guilty of negligence in that he failed to take the precautions which ordinary prudence suggested as he approached this admittedly dangerous place. For twenty-five yards before reaching the track, Griffith, whose duty it was in the circumstances to exercise reasonable care, was in full view of the track and could see and hear the train approaching, if he was alert as he should have been. It is quite true that the approaching train might have been seen by the deceased as he came to the track, if there was no obstruction, and the noise of the train might have given him warning if nothing interfered. But the train which caused the accident was, as I read the evidence, shut out from his view by a freight train going the opposite way—the track being double at this point—and the noise of the train approaching the crossing, and which admittedly caused the accident, might well be confounded with that made by the train going in the other direction and from which latter there was no danger to apprehend. Under these circumstances, the question is: Ought the jury to infer, as they did, that the accident was caused by the absence of the statutory signal, rather than by the failure, on the part of the deceased, to distin-

guish, in the confusion of noises caused by both trains, something to warn him of the approaching train, and which warning he failed to observe? I think, that in view of the opinions expressed in the *Slattery Case*, 3 A. C. 1155, we would not be justified in interfering with the verdict. In a note referring to that case, Sir F. Pollock goes so far as to say "that Their Lordships did not conceal their opinion that the verdict was a perverse one." I do not think that such criticism might fairly be applied to the verdict in the present case.

I would dismiss the appeal with costs.

HON. MR. JUSTICE IDINGTON:—There was such evidence of facts and circumstances tending to prove the respondents' cause that they were entitled to have it submitted to the jury.

It is not necessary in any such case to have the evidence adduced demonstrate that a jury must find a verdict.

In the great majority of cases similar to this, men may reasonably differ in regard to the conclusion to be reached.

We are asked to make a ruling in this case that would absolutely prevent recovery in any accident case unless it was supported by the evidence of eye witnesses.

I do not say that counsel presenting his case fairly as usual, in so many words asks us so to rule.

But I do say, that the logical result founded upon the various arguments put forward would lead to such a result.

No one who has heard or read many of these cases arising from some person having been killed at a railway crossing can fail to have often doubted whether or not under the given circumstances in which the deceased person was placed at the time of the accident, he or she would have heard the statutory warning if given. It may in a small percentage of such cases be that the person killed was stone deaf or hopelessly drunk and from that or other like proof, Courts and juries would be debarred from drawing the inferences they do draw in such cases.

Assuming the person killed possessed of the ordinary human faculties and of the reason and sense springing from the use of such faculties, Courts and juries do infer the use thereof has been made, as a matter of self-preservation.

Given the proof that no statutory warning was given, they go a step further and infer that if such warnings had been given, the needed care would have been taken, and the

accident have been averted. I may doubt in any such case if the absolute truth has been reached. However, I can see nothing wrong in law or sense in that mode of reasoning.

In this case where the man killed was one who, as a matter of precaution, habitually took a longer road than he might, and thus spent daily twenty minutes more than his neighbouring fellow-workmen, in going to and returning from his work, this mode of reasoning seems particularly apt.

I was a member of this Court when we dismissed the appeal in the *Hainer Case*, 36 S. C. R. 180, and I certainly think this well within what was decided there.

No two cases will ever present exactly the same facts and circumstances.

The same confusion arising from coming and passing trains must have operated there as here. The unfortunates in either case might not in fact have been any better off had the law been observed.

Human insight is so limited that reaching absolute truth in regard to anything in everyday life relating to any accident is almost impossible. We must strive to reach as near as we can to the truth without being either too self-confident or bold and presuming too much or conjuring up as timid men do sometimes, more or less shadowy doubts to avoid responsibility.

This case seems to have been most fairly tried and I can see no reason to complain of the result reached.

I am glad to find from the learned trial Judge's charge there was no appeal to passion or prejudice.

I agree in the mode of reasoning which several learned Judges supporting the verdict and judgment have applied to the case.

I should not indeed have added a word but for the strong argument made for appellant and for support of which, I think, expressions here and there of high legal authorities can easily be found, but which are not maintained by the great general mass of authoritative decisions on the subject.

I think the appeal should be dismissed with costs.

HON. MR. JUSTICE DUFF:—The body of the deceased James A. Griffith was found beside the railway track of the appellants, the Grand Trunk Railway Company, near Hamilton, about an hour after he left his place of work for his

home on the evening of the 29th December, 1909. At the trial of the action (brought by the respondents, Griffith's widow and children), out of which the appeal arises, the jury found that he had been run down by an eastbound passenger train of the appellants at the Kenilworth avenue crossing about 350 yards west of the place where his body was found and that the accident was due to the negligence of the appellants' servants in not giving the statutory signals as the train approached the crossing. It is not denied that Griffith's death was due to his being struck by the train in question, but the verdict is impeached in two respects: 1st, That there is no evidence properly leading to the conclusion that Griffith was at the crossing when he was struck down; and 2nd, there was none from which the jury could determine with any reasonable certainty that Griffith came into collision with the train as the result of this default on the part of the company's servants.

It will be convenient to deal first with the second ground of appeal and for the purpose of dealing with it I shall assume that Griffith was crossing the track at Kenilworth avenue, when he met his death; and that as the eastbound train approached the highway the bell of the locomotive was not ringing as the statute requires. The question arising on this topic is whether the plaintiff has shewn facts which justify the inference that Griffith's presence on the eastbound track at the moment he was struck by the train was due to the fact that the statutory signal referred to was not given?

Before examining the facts with a view to answering this question there are two general observations which I think ought to be made. The first of them is this. When a plaintiff in such a case as this proves facts justifying the conclusion that the default of the defendant has materially contributed to the accident in the sense that without that default the accident would not have happened, he thereby establishes a *prima facie* case—unless the facts disclosed fairly and reasonably viewed make it impossible in the absence of further evidence to escape the conclusion that the negligence of the injured person has also been a factor in giving rise to the harm complained of.

I dwell upon this because I think the able and interesting argument of Mr. McCarthy did to some extent involve the fallacious assumption that the plaintiff must as a neces-

sary element in his case exclude the hypothesis of the victim's contributory negligence. The plaintiff must fail if he cannot connect the injury complained of with the defendants' negligence without at the same time proving facts which no reasonable tribunal could hold to be consistent with the absence of contributory negligence on the part of the victim; but he is entitled to succeed if he convinces the jury on facts reasonably leading to that conclusion that the defendants' negligence has materially contributed to the mishap, and if at the same time the jury may reasonably find, and do find, that the defendants have failed to discharge the onus placed on them to shew that there has been such contributory negligence. This appears to me to be quite conclusively demonstrated by the judgment of Lord Watson in the *Wakelin Case*, 12 A. C. 41, in which Lord Blackburn concurred, and by the judgment in the *Slattery Case*, 3 App. Cas. 1155, which Lord Watson mentions; and I think there is nothing in the decision in that case inconsistent with it.

I will not put in my own words the second observation; but will quote words of the Lord Chancellor in *Richard v. Astley*, [1911] A. C. 678:—

“It is, of course, impossible to lay down in words any scale or standard by which you can measure the degree of proof which will suffice to support a particular conclusion of fact. The applicant must prove his case.” This does not mean that he must demonstrate his case. If the more probable conclusion is that for which he contends, and there is anything pointing to it, then there is evidence for a Court to act upon. Any conclusion short of certainty may be mis-called conjecture or surmise, but Courts, like individuals, habitually act upon a balance of probabilities.”

It is quite unnecessary, doubtless, to say so—but if it should be supposed that the principle thus stated by the Lord Chancellor involves any new departure all doubts on that point may be allayed by referring to Lord Cairns' judgment in the *Slattery Case*, 3 A. C. 1155, at pp. 1166 and 1167, Lord Selborne's judgment in the same case, at pp. 1190 and 1191, and Lord O'Hagan's judgment at p. 1184; to the judgments of Lord Esher, Lopes and Kay, L.JJ., *Smith v. South Eastern Rv. Co.*, [1896] 1 Q. B. at pp. 183, 185 and 188; Lord Herschell in *Peart v. Grand Trunk Rv. Co.*, [1908] A. C. 260, as well as to the judgments of the

Judicial Committee of the Privy Council in *McArthur v. Dominion Cartridge Co.*, [1905] A. C. 72, (Lord Macnaghten), at p. 76, and in *King v. Toronto R.W. Co.*, C. R. [1908] A. C. 326, (Lord Atkinson), at p. 242 et seq.

In this case the relevant facts in evidence are—I am proceeding on the assumption above mentioned—that there were two tracks at the crossing in question; that at the time the accident occurred, about 5 o'clock of a December evening, two trains were approaching the crossing, one eastbound on the south track, and the other westbound on the north track, and these trains met and passed each other almost immediately after the eastbound train had cleared the crossing; on the train approaching from the east the bell was ringing, on the other the bell was not ringing. It is important to add that as Griffith walking south came to the railway line his view towards the west would be cut off by a high fence until he reached a point twenty-five yards north of the line and that after reaching that point his vision towards both the right and the left was unobstructed. The first question we have to decide is whether from this state of facts the conclusion could fairly be deduced that the accident would not have happened if the bell had been rung.

I think the jury might properly consider that as Griffith approached the crossing he would see the westbound freight train and hear its bell, and that until he passed the fence on his right he could not see the eastbound passenger train; and that hearing no bell from the west he would be thrown off his guard in respect of trains approaching from that side and would naturally give his attention exclusively to the train he both saw and heard on his left.

It is clear that if after Griffith had passed the fence which was on his right he had glanced along the line westward from that side of the crossing he must have seen the eastbound train; and on the hypothesis that he did so, it is equally clear it would be impossible to justify the conclusion that failure to ring the bell had anything to do with Griffith's death. If the deceased saw the passenger train and either rashly attempted to cross in front of it or was led to attempt to cross by his own error in miscalculating the position or speed of the train—in either case there could be no ground for connecting the failure to ring the bell with the accident; and the important question appears to be whether the jury could properly infer that the eastbound train was

not observed by the deceased until, at all events, it was too late to enable him to save himself. I think they might do so. I think they might properly consider that in the circumstances hearing no bell from the east and having his vision in that direction obstructed by the fence on that side while the freight train at the same time was in full view west of the crossing, he not unnaturally might and probably did proceed without thought of possible danger from the opposite direction.

The other hypothesis—that seeing the eastbound train he was led into attempting to cross by an error of judgment as to the position or speed of the train might no doubt, considered in itself, be a possible explanation of what occurred. But I do not think the examination of these two possible hypotheses could properly be withdrawn from the jury. They presented a question for the jury in my opinion for this reason. The first proceeds upon the theory that happened which in the ordinary course of events would be likely to happen as the result of the failure to ring the bell assuming Griffith to have acted in a way in which, according to common experience, the jury might reasonably consider it unlikely that an ordinary person having experience of the railway practice respecting signals for highway crossings would act. The other involves the assumption that Griffith acted in a way in which the jury might properly think only a very rash man would act. I think the plaintiff having thus connected the accident with the fault of the defendants, proving such negligence on their part as was calculated according to the common course of experience to result in just such an eventuality as that which happened, in fact, it was for the jury to consider the weight of any suggestion that the victim brought disaster upon himself by an attempt to do something in itself extraordinary, or something which in the particular circumstances the jury would be entitled to think an ordinary person would be unlikely to do. The plaintiff's case appears to be in that position and that I think is sufficient to bring it within the principle stated by the Lord Chancellor and already quoted.

Each of the cases referred to above affords an illustration of this method of dealing with such questions. In Slattery's case the victim had been killed while attempting to pass in front of a train which he could not have failed to see if he had looked in the direction from which it was

approaching. Nobody knew whether he saw the train or not. There was evidence from which the jury might have inferred that he knew it was the practice of trains before passing the locality in question to give warning of their approach by whistling and there was evidence that at the moment of crossing he was in a preoccupied state of mind. The majority of the Law Lords held it to be a question for the jury whether he was put off his guard by the failure of the train to whistle or whether on the other hand he saw the train, but rashly or through excusable error of judgment attempted to pass before it. In *Smith v. South Eastern R.W. Co.*, [1896] 1 Q. B. 178, nobody knew whether the victim had or had not seen the train which ran him down; but the practice was (as the man who was killed might be supposed to know), that when a train was approaching the crossing at which the accident occurred the gate-keeper stood there and informed the driver by signal whether or not the line was clear; and the train which caused the death of the victim passed the crossing immediately after he had left the gate-keeper sitting in his cottage. It was considered by the Court of Appeal that from these circumstances the jury might infer that the victim had been led into a sense of security by his knowledge that the gate-keeper was not at his accustomed post when a train was about to pass, and that he had not seen the train until it was too late to escape. In *King v. Toronto R.W. Co.*, C. R., [1908] A. C. 326, there is another example of a similar mode of reasoning. In *Dominion Cartridge Co. v. McArthur*, [1905] A. C. 72, the injury complained of arose from an explosion in a cartridge factory. One of the machines had defects which might have been expected to lead to such an explosion, notwithstanding the absence of any carelessness on the part of the victim who at the time of the explosion was engaged in working it. There was no suggestion of negligence on his part, and it was held to be a proper inference that the explosion arose from the defects proved. I may add that in *Crouch v. Père Marquette*, S. C. R. ? , recently decided in this Court (where it was shewn that the signals given by a train approaching a highway were calculated to mislead and that the signpost had been removed from the crossing), it was held that the jury might infer that the death of the victim, a traveller on the highway, was due to his being misled by the signals or deceived as to the

part at which the track crossed the highway; and that it was for them to say whether the rival suggestion that the victim's horse had taken fright when approaching the railway line was to be accepted or rejected.

If the jury considered the weight of probability to favour the conclusion that Griffiths did not see the passenger train in time to escape it, then it seems clear that the question of contributory negligence could not be withdrawn from the jury. The considerations to which the majority of the Law Lords give effect in *Slattery's* case and which prevailed in *Smith v. South Eastern R. Co.*, [1896] 1 Q. B. 178, and in *King v. Toronto R. Co.*, C. R., [1908] A. C. 326, appear to be entirely applicable.

I quote in extenso two passages from the judgments in *Smith v. South Eastern R. Co.*, [1896] 1 Q. B. 178. At pp. 185 and 186, Lopes, L.J., says:—

“Then it was said that this case fell within the authority of *Wakelin v. London & South Western R. Co.*, 12 A. C. 41, because the circumstances under which the deceased came by his death were not known, and that the evidence given for the plaintiff was at the best equally consistent with the death of the plaintiff's husband having been caused by his own negligence as with its having been caused by the defendants' negligence. It was said that the train carried lights, that it could be seen more than 600 yards off, and that the driver sounded his whistle; and, therefore, that the deceased man must have been guilty of contributory negligence by reason of the reckless way in which he crossed the line. Of course, if that could be established, the argument which the defendants' counsel based upon *Wakelin v. London & South Western R. Co.*, 12 A. C. 41, might be sustained. The question is whether on this point the case could have been withdrawn from the jury. Can it be said that the evidence was equally consistent with the view that the death of the plaintiff's husband was caused by his own negligence as with the view that it was caused by the defendants' negligence? I have felt some difficulty on this point: but on consideration the case strikes me in this way. The deceased appears to have known the crossing and the practice there with regard to the signalling of trains. Was it not a question for the jury whether the deceased, finding that the signalman remained sitting at his lodge and was making no attempt to signal any approaching train, might not reasonably

have supposed that he could safely cross the rails without taking the precaution of looking up and down the line or listening for the whistle of a train? On consideration I have come to the conclusion that on this question there was evidence for the jury, and, if I had been trying the case, I do not think I could have withdrawn it from them."

The observations of Lord Esher, at pp. 183 and 184, are to the same effect:—

"The deceased man lived in the neighbourhood, and had been at the crossing on previous occasions. I think there was evidence from which the jury might infer that he knew that Judges had to perform the services which I have mentioned for the company, whenever a train was passing over the crossing; and, that being so, they might on the evidence, take the view that, under the circumstances, it was not a want of reasonable care on the part of the deceased to presume that, as Judges remained in his house, no train was coming, and, therefore, he might go over the crossing in safety without taking the precaution of looking up and down the line, or any other such precaution as might otherwise be necessary. If that be so, there was evidence for the jury upon the question whether there was any want of reasonable care on his part. In saying this, I think, I am acting on the view expressed by Lord Cairns in the case of *Dublin, Wicklow & Wexford R^w. Co. v. Slattery*, 3 A. C. 1155. He seems in that case to have thought that, if a man had a right to suppose from his knowledge of the practice at the station that an approaching train would whistle, the jury might come to the conclusion that the absence of whistling had thrown him off his guard, and had produced in him a state of mind in which he might not unreasonably suppose that it was unnecessary for him to look out before crossing to see whether a train was coming. So here, I think, in the case of a man who knew the practice at the crossing, the jury might say that the fact that the signalman remained in his house produced in his mind a sense of security which would prevent its being a want of reasonable care not to look up and down the line to see whether a train was coming. Therefore, without entering into all the questions which have been discussed during the argument, I think the considerations which I have mentioned are sufficient to determine this case, and to entitle the Judge at the trial to decline to withdraw the case from the jury."

The remaining question stands thus. There was evidence from which the jury might conclude that Griffith habitually avoided the railway. There is no reason for supposing that on the occasion in question he did not follow his usual practice except the fact that his body was found a considerable distance from the crossing. I think the question whether the situation of the body was so inconsistent with the supposition that he was on the crossing when he was struck as to lead to the inference that he was killed while walking on the track or to leave the whole matter too doubtful to justify any conclusion upon it was a question of fact, which could not be withdrawn from the jury; and, I think it is quite impossible to say that their verdict on this point was an unreasonable one.

HON. MR. JUSTICE ANGLIN:—The defendants appeal from the judgment of the Court of Appeal for Ontario upholding a verdict against them for damages for the death of the plaintiff's husband. The plaintiff's case is that, while lawfully crossing the defendants' railway track on Kenilworth avenue in the city of Hamilton, in returning from his work to his home on the evening of the 29th December, 1909, her husband was struck and killed by a train of the defendant company, which had failed to give the requisite statutory warning of its approach, and that this omission of duty was the cause of the accident.

At the trial and in the Court of Appeal the defendants contended that it was not established by the evidence whether the deceased had been killed by the train in question or by a train which had gone over the crossing shortly before, as to which no proof of breach of statutory duty had been given. The jury found against the appellants upon this point: the Court of Appeal confirmed the finding; and it was expressly accepted by counsel for the appellants at bar in this Court.

In support of their appeal the defendants now take two grounds: first, that there was no evidence to sustain the finding that the deceased when struck by the train was on the highway crossing; and second, that, although the omission of the statutory signal had been proved, upon the evidence it was a mere surmise or conjecture and not a legitimate inference that this was the cause of the accident.

There was no eye witness of the accident. The train which must now be taken to have struck the deceased was

travelling in an easterly direction. His body was found some 350 yards to the east of Kenilworth avenue crossing; his dinner-can and a mitten were picked up some fifty yards farther west than the body, and at the latter point there were also found traces of blood and hair upon the rails. There is no evidence of any indicia of the accident nearer to the crossing. Several of the plaintiff's fellow-workmen testified that it was his habit in returning to his home not to walk along the railway as other workmen did, but to cross it at Kenilworth avenue. He was never known to have followed the railway track in going home. There was some evidence by two of his fellow-workmen, who, on the night in question, were walking home along the railway track, that, at a point about 110 yards to the west of Kenilworth avenue, they were overtaken by the train which killed the deceased, and that looking up the track they did not see any person on the railway right of way either at the crossing or beyond it. The plaintiff also stated in evidence that she had warned her husband of the danger of walking upon the track and that he had assured her that he never did so. I, however, exclude this latter piece of evidence from consideration, as I think its admissibility very doubtful.

Having regard to the other evidence to which I have alluded and to the fact that it should not be assumed that an illegal act, such as trespassing upon the railway right of way would have been, was committed by the deceased, would a jury be justified in inferring that he was on the crossing when struck by the train; or does the mere fact of his body being found 350 yards east of the crossing preclude that inference? Had the body been found only a few yards from the crossing the jury's finding could not, I think, have been questioned. That the deceased was carried some distance by the engine is manifest from the fact that his can and mitten were found 50 yards nearer to the crossing than his body. That the bodies of men and of animals struck by railway engines are sometimes carried by them for considerable distances is well known. There was no evidence given of anything in the condition of the body or in its position with regard to the railway tracks when found which would indicate whether it had or had not been carried any considerable distance. In these circumstances it was, I think, for the jury to determine what weight should be given to the fact that the body was found where it was. It was for them

to say whether, it being clear that the body had been carried for some distance, it was reasonable in the circumstances to infer that it had been carried the whole 350 yards. It was within their province to decide whether the inference that the deceased had followed his usual course in returning home on the night in question, and that he had, therefore, been struck on the crossing, was rendered unsafe and improper because of the distance from it at which the body of the unfortunate man was found. The jury having drawn this inference, although the case is certainly a very close one, I am not prepared to say that their finding, affirmed by the provincial Court of Appeal, should now be set aside.

Upon the second question two considerations are pressed on behalf of the defendants; first, that a person coming toward the crossing, as the deceased did, could have a clear and unobstructed view of an approaching train for 25 yards before he reached the rails, and that, had he looked when at that distance, or at any time thereafter before he crossed tracks, Griffith could not have failed to see the train; it is, therefore, urged that his death should be ascribed rather to his failure to take ordinary care than to the defendants' omission of their statutory duty; in the second place, it is said that the train, when approaching the crossing, was ascending a grade, and that in doing so the engine made so much noise that, as the plaintiff herself says, it was audible to her standing in her doorway half a mile east of the crossing; and she adds that she also saw the light from the fire-box reflected in the escaping smoke and steam. The appellants maintain that it is, therefore, a pure conjecture that Griffith would have heard the omitted signal, had it been given.

In support of his contention that the case should have been withdrawn from the jury Mr. McCarthy urged that the fact that the accident might be attributed to failure of the deceased to look or listen before crossing the railway rendered it impossible for the jury to find, except as a mere guess or surmise, that breach of duty on the part of the defendants was the cause of the accident. The conduct of the deceased is primarily of importance upon the issue of contributory negligence. With that issue the jury must deal, the burden of proof being upon the defendants. It certainly cannot be laid down as an absolute rule that failure to look and listen before crossing a railway must in every instance and in all

circumstances be held to be contributory negligence sufficient to debar relief. There may be circumstances which wholly excuse that omission. That the deceased might have been in a flurried state of mind owing to anxiety to procure a ticket for a friend was deemed a consideration which could not have been withdrawn from the jury in *Dublin & Wicklow R.W. Co. v. Slattery*, 3 A. C. 1155, 1167. In the present instance the evidence establishes that when Griffith reached the Kenilworth avenue crossing, assuming him to have been struck on that crossing as found by the jury, there was a freight train approaching from the east. This train, it is proved, gave the statutory signals for the crossing, and it is quite possible that his attention may have been so absorbed by it that, for that reason, he failed to hear or observe the train coming in the opposite direction. It is for the jury to determine whether, in these circumstances, his failure to look to the west when about to cross the tracks amounted to contributory negligence.

Then it is urged that, having regard to the presence of the freight train and to the fact that the deceased presumably failed to hear the great noise made by the engine of the passenger train which struck him, it must be the veriest conjecture or surmise to say that if the latter had given the statutory signals they would have attracted the attention of the deceased and prevented the accident. The method of presenting the defendants' case is certainly captivating. We have, however, the fact that Parliament has deemed it wise to enact that railway trains approaching highway crossings shall give certain signals not for the purpose of attracting the attention of those who are already on the alert and need no warning, but for the purpose of arousing those who are distracted or whose attention is absorbed, owing to whatever cause, and who, therefore, need warning. Parliament has specified the particular signals which in its judgment are best fitted to serve this purpose. Where it is clearly proved that those signals have been omitted and that an accident, which the giving of them might have prevented, has occurred, it must, I think, always be within the province of a jury to say whether or not, having regard to all these circumstances, the breach of statutory duty should be taken to be the determining cause of the accident. The moment the decision is reached that the statutory signals, if given, might have prevented the accident, and there is evidence

of their omission; it is not proper for the trial Judge to withdraw the case from the jury (unless, indeed, what is incontrovertibly contributory negligence is admitted or is so clearly proved in the plaintiff's own case that it would be proper to direct a jury to find it), and if, upon the case being admitted to them, the jury see fit to draw the inference that the omission of the signals was in fact the cause of the accident, it is not competent for an appellate Court to disturb that conclusion. Had I been trying this case without a jury I am by no means satisfied that I should have reached the conclusion at which the jury arrived. But, as has been pointed out time and again, an appellate Judge should not, for that reason, interfere.

I would dismiss this appeal with costs.

HON. MR. JUSTICE BRODEUR:—The appeal should be dismissed. I agree with the opinion given by the Chief Justice.

Appeal dismissed with costs.

EXCHEQUER COURT OF CANADA.

MARCH 16TH, 1912.

REX v. ELI A. RIVERS.

REX v. JAMES EUGENE TAGGART.

Ex. C. R.

*Crown — Expropriation of Land — Public Works—Compensation—
Market Value—Potential Value—Evidence.*

T. purchased a block of land on 1st July, 1910, for \$4,480.56. On 18th May the Crown expropriated it, offering him \$6,350. T. refused, claiming \$15,000, alleging the land to be of special value as factory site.

Held, that there was no evidence that the land would ever be purchased as a factory site. That the Crown had offered full compensation, which T. must accept and pay the costs of the action so far as his case was concerned.

R. owned a piece of land adjoining T.'s property. The Crown offered him \$3,000. R. refused, claiming \$17,769, alleging the land to be of special value as a stone quarry to himself as he was engaged in the building contracting trade.

Held, that \$3,000 offered by the Crown was full value for the land, but R. should be allowed an extra \$2,000 as special damage for loss of the stone.

Dodge v. Rex (1906), 10 Ex. C. R. 208, reversed: 38 S. C. R. 149 followed.

John Thompson, K.C., for the plaintiff.

A. Haydon, for the defendants.

HON. MR. JUSTICE CASSELS:—These two cases were tried together, the evidence as to values being common to both parcels of land expropriated, with the exception that Rivers puts forward a claim for special damage which I will deal with hereafter. The total land expropriated contains an area of 3.09 acres. The date of the expropriation and the time at which the compensation has to be assessed, is the 18th May, 1911. Of the 3.09 acres, Taggart on April 6th, 1911, sold Rivers about half an acre abutting on Division street. It comprises property shewn on the plan, plaintiff's exhibit number 2. of lots 15, 16, 17 and 18 on Division street, and 14 and 13 on a proposed street shewn on the map. The balance of the property consisting of lots from 1 to 30 is the property retained by Taggart. The Crown offers Rivers the sum of \$3,000 for his lots expropriated for public purposes. Taggart is offered \$6,350. Rivers claims the sum of \$17,769. Taggart claims the sum of \$15,000. I am of opinion that the parties have grossly exaggerated their damage. While owners of land whose property in the public interest is expropriated for public works, are entitled to full compensation, they are not entitled through the instrumentality of Court procedure to obtain excessive amounts. It is no doubt often distressing to owners of properties to have to give up their property which they would prefer not to sell, nevertheless public interest requires that people should submit, and all that the owners can claim is that they should be fully compensated.

There is no question on the evidence but that the block in question is in one of the poorest districts of Ottawa for residential purposes. The property itself irrespective of the locality is of a nature that makes it undesirable even for residential purposes of the class described in the evidence. A part of it on Rochester street has been shewn to consist of a high bluff of rock. I credit Doctor Taggart when he says that that rock might be removed for the value of the rock, and so have the land levelled off to the level of Rochester street. Another portion of the land in the centre is low land that would require to be filled in. It is said that the land is suitable for factory sites. I have no

evidence before me of there being any factories in the neighbourhood of the land. Any compact block of land of sufficient size with a railway approach is unquestionably suitable for factory sites; but the suitability of a piece of land for factory sites is one thing. but whether it would be ever purchased for a factory site is another thing. Doctor Taggart prepared his plan intending as he states to register it. This plan shews small building lots. It is quite true that any person desiring to purchase it for factory purposes might buy several lots, but such a thing might happen as lots being sold here and there and built upon which would leave the balance unsuitable for factory purposes. I think also the evidence of the witnesses who placed the value for factory purposes as about the same as for building lots is to be accepted. In my view the offer made to Doctor Taggart of \$6,350 is ample and fair compensation. The evidence offered on behalf of Doctor Taggart is mere matter of opinion not based upon sales in the neighbourhood. The salient facts are as follows:—

Taggart purchased the whole block containing 3.09 acres in July of 1910, for \$4,480.56. His own witness Pratt states that the general increase in the value of properties between the 1st July, 1910, and the 18th May, 1911, would be from 25 to 33 per cent. I very much doubt if the property in question, having regard to its surroundings and the nature of the property itself, would have increased to that extent. It is a mere matter of surmise. But even assuming Pratt's statement to be correct, and allowing an increase of 33 per cent. it would bring the value of the property from \$4,480 to about \$6,000. The Crown is offering for this same property the sum of \$6,350.

In August of 1908, the property immediately to the north of the property owned by Rivers, and which is said to comprise an acre, was purchased by the Government from the Ogilvie estate at \$2,000. It is clear on the evidence that this piece of land was a better block than the land now owned by Rivers, and considerably better than the balance of the land retained by Taggart. I will allow Doctor Taggart the sum offered by the Crown, namely \$6,350, which in my opinion fully compensates him. I think that Taggart must pay the costs of the action so far as his case is concerned.

Rivers stands in a different position. Rivers purchased the property in question, namely, half an acre on the 6th

April, 1911. The expropriation was on the 18th May, 1911. The purchase price, namely, \$3,000, was not paid in cash, it was made up of an exchange of lands. Rivers conveyed to Taggart some lands on Nelson street, and in exchange Taggart conveyed to Rivers the land in question. It is stated that the lands on Nelson street have since been sold at an increased price. I think as far as the value of the lands alone is concerned that the sum tendered to Rivers, namely, \$3,000, would be full compensation.

Rivers makes up his claim as follows: He places the value of the half acre in question as land for building purposes at \$6,000. He places the profit from the stone on the land, which I will deal with presently, at \$5,230. He then goes on to state that by reason of the expropriation of the land in question he had to purchase other land for which he paid \$6,000. This last claim for the value of the land purchased by Rivers was but faintly urged by his counsel. In regard to the claim for the value of the stone it is put forward in this manner. Rivers states that he is in the contracting building business. He states that on the property in question there is stone suitable for the purposes of his building trade. He states that by excavating the half acre to a depth of 20 feet about 17,664 yards of stone could be procured. His claim is that he could quarry and haul this stone and utilize it toward his building purposes. That the carts used in the haulage of this stone could return loaded with the clay or sand excavated from the land upon which the works that he was contractor for were being built, and that in that way the pit or hole made by the quarrying to a depth of 20 feet would be sufficiently filled in so as to leave the lot adapted for building purposes. The law is summarised in *Dodge v. Regina*, in the judgment of the Court: 38 S. C. R. p. 155, as follows:—

“The market price of lands taken ought to be the *prima facie* basis of valuation in awarding compensation for land expropriated. The compensation for land used for a special purpose by the owner, must usually have added to the usual market price of such land a reasonable allowance measured by possibly the value of such use, and at all events the value thereof to the using owner.”

There are of course numerous other authorities. Now, while I think that Rivers is entitled to some compensation for the loss of the stone and the consequent loss of the profit

to him by reason of the expropriation, I am unable to arrive at the conclusion that he is entitled to the number of yards claimed, namely the 17,643 and the profit thereon of \$5.230, claimed in his evidence. There is no evidence before me of the nature of the works which he is contracting to perform. Such buildings as he is at present constructing would no doubt be considerably above the foundations. The earth removed from these buildings would have been placed elsewhere. It is only for future contracts that the stone would be available and the necessary filling obtainable. For all I know it may be years before the product of the whole pit would be required. In the meantime the property would be lying idle, and the interest and taxes would be accumulating. Taggart states in regard to his lot, that when desired to level the land to the level of Rochester street parties would be willing to do the levelling for the value of the stone. If the stone on Rivers' lot were excavated to a depth of 20 feet by some one not able to utilize it in his own business, the cost of filling it up to a sufficient level for building purposes would probably equal the value of the stone. While I think Rivers entitled to some compensation, I am not prepared to allow the full amount of the claim made before me. I think if he were allowed the sum of \$3,000. offered by the Crown and an additional sum of \$2,000. for his loss in connection with the stone he would be amply compensated. Judgment will go in favour of Rivers for \$5,000. Rivers is entitled to his costs of the action. He is also entitled to interest from the date of the expropriation to judgment.

DIVISIONAL COURT.

FEBRUARY 21ST, 1912.

HOLMAN v. KNOX.

3 O. W. N. 745; Q. L. R.

Landlord and Tenant — Lease — Breach — Action to Recover Possession—Damages for Taking Down Wall of Building.

Plaintiff landlord brought action to recover possession of property leased to defendant tenants on ground of breach of covenants, and to recover damages for said breach. Defendants owned the store adjoining the one leased from plaintiffs, and in order to facilitate their business they cut a large opening in the wall between the two stores. This was the main ground of objection by plaintiffs.

SUTHERLAND, J., 20 O. W. R. 121; 3 O. W. N. 151, ordered defendants to restore the wall in question to the condition it was in before being interfered with by them and pay the plaintiffs the sum of \$10 as damages for the breach of the covenant in the lease as to repair. The wall to be restored within one month. The defendants to pay the plaintiffs their costs as between solicitor and client.

DIVISIONAL COURT *held* that the covenant to repair is a continuing covenant, and each day that there is a state of nonrepair, constituting a breach of the covenant, there is a right of entry and a right to forfeit the lease.

That the Landlord and Tenant Act, R. S. O. (1897) c. 170, does not require that the notice should be given after the right of re-entry has arisen. It must be given after the act or neglect upon which the right to re-enter arises, but it may be given before the forfeiture takes place.

That what the statute requires is that before the landlord asserts the forfeiture he shall have given notice, not of his intention to forfeit, but of his desire to have the covenant lived up to, drawing attention to the particular thing which the tenant has done, or left undone. The notice does not need to be an election, but is to serve as a warning to the tenant so as to prevent him being taken by surprise.

That what was done was a breach of the covenant, but relief ought to be granted to the defendant's prayer under s.-s. 2 of s. 13 of the Act, and the only appropriate relief would be the restoration of the wall within a reasonable time, three months, and that may be extended from the date of this judgment.

That, aside from the question of forfeiture, the taking down of the wall under the circumstances was waste, the appropriate remedy for which would be the restoration of the wall within the time limited by the trial Judge.

That the costs below should be allowed between party and party; the time for completing the repairs to be extended to three months from the date of this judgment. With this variation of the judgment below the plaintiff's appeal was allowed with costs and the defendants' appeal dismissed with costs.

An appeal and a cross appeal from a judgment of HON. MR. JUSTICE SUTHERLAND, 20 O. W. R. 121.

There were two writs issued, the first on 29th June, 1909, and the second on 22nd October, 1909, under the first claiming to restrain the defendants from tearing down the party

wall and for damages for breaches of covenants to repair and claiming possession for breach of covenant and right of re-entry, under lease from the plaintiffs' predecessor in title to the defendant's predecessor in title.

The plaintiffs claim title by grant from the Crown dated 27th June, 1899. Prior to their grant the Crown had leased the property in question to one Jamieson by lease dated 27th of June, 1895. The property is situated on the north-west corner of Yonge and Queen streets, with a frontage of 40 feet on Yonge street, and a depth of 82 feet 6 inches on Queen Street, "together with the wall about 18 inches thick described in a deed dated 19th of July, 1867, made between Charles McIntosh of the first part and the Board of Agriculture for Upper Canada of the second part as projecting 9 inches upon the next adjoining land to the north of the parcel of land above described, and the right and liberty to maintain, continue, use, build and rebuild such wall as granted to the Board of Agriculture for Upper Canada by virtue of the provisions of the deed."

The McIntosh deed here referred to further provided that the wall might be used as a party wall by the grantee and the grantor, the latter being then the owner of the property on Yonge street immediately north of the lands conveyed. This lease was made in pursuance of the Act Respecting Short Forms of Leases, and included the wall described in the McIntosh deed. In this lease the lessee covenanted to build at his own expense, under plans approved by the architect to be named by the lessor, a building of certain description of the value of not less than \$25,000, the lessor to deposit \$10,000 to insure the performance of this covenant. At the date of the execution of the lease the land was vacated with the exception of the wall on the north side referred to in the McIntosh deed, which was then standing, the building, of which it formed the north wall, having been burned.

The lessee covenanted in the usual short form, to pay rent and to repair, and that the lessor might enter and view the state of repair, and that the lessee would repair according to notice and would leave the premises in good repair.

The building was erected and occupied for some time by the tenant Jamieson, who assigned the lease to the defendant, and on or prior to 12th of March, 1909, the defendants went into possession.

The defendants were also tenants of the premises to the north, and occupied both premises as a store, and for the more convenient use of the same they took down the partition wall between the two premises. It appeared from the evidence called for the defence that on 20th of March, 1909, the defendants cut a door-way through the wall without the knowledge or consent of the plaintiffs. This coming to the knowledge of the plaintiff Thomson, objection was made and negotiations entered upon and continued for sometime with a view of reaching an agreement permitting a further portion of the wall to be taken down; and from the evidence of both parties it appeared that a written agreement was contemplated. This was drafted but the parties differed as to what it should contain, and never reached a satisfactory conclusion. The defendants now claimed that what was done was by leave. The trial Judge found against them on this point, see 20 O. W. R. 121.

The learned trial Judge referred fully to the various interviews had between the parties and accepted the statement of the plaintiff Thomson as to what took place as against the witnesses of the defendants, and found as a fact that no leave was given to the defendants to proceed with the work as they alleged.

The appeal to Divisional Court was heard by HON. MR. JUSTICE CLUTE, HON. MR. JUSTICE LATCHFORD, and HON. MR. JUSTICE MIDDLETON.

E. D. Armour, K.C., for the defendants, appellants.

W. N. Tilley and R. H. Parmenter, for the plaintiffs, respondents.

HON. MR. JUSTICE CLUTE:—I have carefully read all the evidence, which I think fully supports the finding of the learned trial Judge.

On the 16th of July, 1909, the defendants gave the following notice: "To Seymour H. Knox and Daniel Good, sirs: Having this day entered (to examine the condition thereof) the demised premises situate at the north-west corner of Queen and Yonge streets in the city of Toronto, now occupied by you under lease hereof bearing date the 27th day of June, 1895, and expressed to be made between Her Majesty the Queen, represented therein by the Honourable William Harty, the Commissioner of Public Works for Ontario, as lessor, and

one Philip Jamieson of the city of Toronto in the county of York, merchant, as lessee, whereby Her Majesty the Queen did demise and lease to the said Philip Jamieson the lands therein particularly described together with the wall described in deed dated the 19th day of July, 1867, and made between one Charles McIntosh of the first part and the Board of Agriculture for Ontario of the second part, and having on such examination found the following want of reparation, to wit, that openings have been made in the said wall and part of the same has been entirely demolished and removed and said openings and portion of wall removed have not been restored; now we hereby give you notice to well and sufficiently repair and make good the said want of reparation by well and sufficiently restoring said wall to its former condition and closing all openings therein within three calendar months next after the giving of this notice. Dated at Toronto this sixth day of July, 1909. Trustees under the last will and testament of the Hon. Wm. McMaster, per D. E. Thomson, one of said trustees."

The extended form of the covenant to enter and view the state of repair and to repair according to notice in writing provides that all want of reparation that upon such view shall be found and for the amendment of which notice in writing shall be left at the premises shall be made within three calendar months next after such notice is given. The above notice is the form usually adopted under this covenant.

The trial Judge held that no notice had been given as to the forfeiture of the lease in the terms required by R. S. O. (1897), ch. 170, sec. 13, and that the landlord was not in a position when the writ of possession was issued to assert a right of re-entry or forfeiture under the lease.

Sub-section 1 of section 13 provides that a "right of re-entry or forfeiture under any proviso or stipulation in a lease for a breach of any covenant or condition in the lease shall not be enforceable by action or otherwise unless and until the lessor serves on the lessee a notice specifying the particular breach complained of, and if the breach is capable of remedy requiring the lessee to remedy the breach, and in any case requiring the lessee to make compensation in money for the breach, and the lessee fails within reasonable time thereafter to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money to the satisfaction of the

lessor for the breach." The reparation must be made "within a reasonable time after notice."

The trial Judge found that the plaintiffs had failed to make out a case of forfeiture, but that by taking down the wall the defendants committed a breach of the covenant to repair. He entered judgment for the plaintiffs, and under the prayer for general relief directed that the defendants restore the wall in question to the condition it was in before it was interfered with within one month, assessed \$10 for damages for breach of the covenant to repair, and gave the plaintiffs costs as between solicitor and client.

Mr. Armour's contention, as I understand it, is that the notice is obviously given under the covenant to repair according to notice, that was a waiver of the forfeiture (if there was one) under the covenant to repair and the finding of no forfeiture was right. The action cannot be maintained under the second covenant, because the notice required by sec. 13. sub-sec. 1 of the Landlord and Tenants Act has not been complied with; that the relief given cannot be granted under the findings as they stand or under the prayer for other relief, and no amendment was asked and should not now be granted; that the relief granted was in effect specific performance which could not be given; nor had the Court jurisdiction to grant a mandatory order in a case of this kind, and that what was done by defendant was within the right of the tenant under the lease.

On the first point the case chiefly relied upon was *Doe v. Meux*, 4 B. & C. 606. In that case, where a lease contained covenants to keep the premises in repair and to repair within three months after notice, and a clause for re-entry for breach of any of the covenants, and the premises being out of repair the landlord gave a notice to repair within three months. The notice to repair was given on 7th August, 1823. On the 24th of October, 1823, the lessor or plaintiff received a half year's rent to September 29th, 1823, and the declaration in ejectment (which was the commencement of an action of ejectment prior to the C. L. O. Act of 1852) was served on the 28th of October, 1823, being prior to the expiration of the three months' notice to repair. The premises were and continued out of repair until the trial. Bayley, J., said that the landlord had an option to proceed under either covenant, and after giving notice to repair within three months he might have brought an action against the defendant upon a former

covenant for not keeping the premises in repair, "but that is a very different thing from insisting upon the forfeiture." It is said that the premises being out of repair on the 6th of August when a notice was given the lease was thereby forfeited, but the landlord has affirmed that the lease subsisted up to the 29th September by receiving the rent which became due at that period. It is plain, therefore, that he did not intend to insist upon an immediate forfeiture at the time when the notice was given," "And I think that notice amounted to a declaration that he should be satisfied if the premises were repaired within three months, and that he thereby precluded himself from bringing an action before the expiration of that period." He further points out "that in *Doe v. Paine*, 2 Camp. 520, the language of the notice was very different. The tenant was required to put the premises in repair forthwith. That did not prevent the landlord from bringing his ejectment at any time." Holroyd, J., said, "I am of opinion that this ejectment was brought too soon, for it appears to me that the notice requiring the tenant to repair within three months was an equivalent to an admission that the tenancy would continue up to the expiration of that time. If it did not operate as a waiver of the forfeiture incurred by breach of the covenant to keep the premises in repair, the landlord might be able to bring ejectment after the tenant had put the premises into complete repair pursuant to notice which would be extremely unjust, but I think that although the action for breach of covenant would remain, yet the forfeiture was waived." The *Meux Case* decided that the effect of the notice was a waiver of forfeiture until after the expiration of the notice, by which time, if repairs were completed no forfeiture would occur, and as the action was commenced before the expiration of the three months, it was premature. It does not decide that this was not a continuing breach, but rather implies the contrary, else what is the meaning of the statement that the landlord did not intend to insist upon an immediate forfeiture, and that the notice amounted to a declaration that he would be satisfied if the premises were repaired within three months, and thereby precluded himself from bringing his action before the expiration of that period? This case was referred to in *Few v. Parkins* (1867), L. R. 2 Ex. 95. There under a similar lease containing covenants on the part of the lessee to keep the premises demised in repair, and a further covenant that

he would repair within three months after notice, the premises demised being out of repair, the landlord gave notice to repair in accordance with the covenant. Before the expiration of three months ejectment was brought and it was held that the notice was not a waiver of the forfeiture incurred by the breach of the general covenant to repair, and that the action was maintainable. Kelly, C.B., distinguished the *Meux Case* by pointing out that there the notice was specific to repair within three months, and that in the case before him the notice was general in terms and similar to that in *Roe v. Payne*, where it was held to have no effect on the right of entry for breach of the general covenant. He then points out, "he has pursued the usual, though not necessary, course of giving his tenant notice to repair. But he does not thereby lose his right of entry if the repairs are not effected by the tenant." Channell, B., refers to the observations of Bayley, J., and Holroyd, J., in *Doe v. Meux*, but did not think they applied to the facts of the case before him. It will be seen on reference to the *Meux Case* that notice was given on the 6th of August, and rent was received which became due up to the 29th September, which made it clear that an immediate forfeiture was not intended at the time when the notice was given, and indicated that the landlord would be satisfied if the premises were repaired within three months and thereby precluding himself from bringing ejectment before the expiration of that period. The declaration in ejectment was in fact served before the expiration of the three months' notice to repair.

It is said in Fawcett's work on Landlord and Tenant, 3rd ed., 502, that where there is a general covenant to repair and also a covenant to repair after notice, a notice to repair within a specified period, as three months, is a waiver of the general covenant, and there is no forfeiture till the period has elapsed, referring to the *Meux Case*, and also to *Doe v. Lewis* (1836), 5 A. & E. 277. In this case Patterson, J., refers to *Doe v. Meux*, and points out that Bayley, J., does not say that the party by proceeding on the special proviso waives his right to proceed on the other, but Holroyd, J., does say so. He also refers to *Rankin v. Brindley*, 4 B. & A. 84. In that case there was a general covenant to repair, but no specific power for re-entry for breach of that covenant. Then there was a covenant for re-entry in case of non-repair within three months after notice, or in case of breach of the other coven-

ants. Notice was given to repair within three months. Ejectment was brought before the expiration of the three months. On the trial by consent an order of Court was made that a juror should be withdrawn and the repairs performed on or before the 24th June. Afterwards rent accrued which the landlord accepted. This was before the 24th of June, so that the forfeiture, which was afterwards incurred by not repairing on or before the 24th of June was not waived. Repairs not being performed on that day ejectment was brought. Plaintiff had a verdict. The Court refused a rule for a new trial. It was held that the right of entry was at all events only suspended. Parke, J., said, "And the lessor of the plaintiff being unable to support that action, put an end to it by consenting to the order of Court . . . it was merely a consent to postpone the time of completing the repairs for the benefit of the defendant; and on his failing to comply with the terms, the lessor of the plaintiff might justly insist on his right of entry, and bring a new ejectment after the expiration of the enlarged time. The receipt of rent was only an admission that the defendant was tenant until the 25th of March, and could not operate as a waiver of the forfeiture." Taunton, J., was of the same opinion. This appears having regard to the facts in that case to have reference to the right of entry for non-repair after the expiration of three months notice.

Doe v. Lewis (supra) appears to be authority only for the view that where a lessor has a remedy for recovering the expense of repairing and elects to do the repairs himself he waives the forfeiture under the general covenant. Patterson, J., points out that the circumstances differ from *Rankin v. Brindley* for the time is not enlarged for the benefit of the defendant. "The landlord says, I shall take advantage of the proviso enabling me to compel you to repair, or, if you do not repair within the two months, to perform the repairs myself, and on so doing, to distrain, not to re-enter. The tenant thus has the option given him, and exercises it by not repairing. The relation of the landlord and tenant is so far from being put an end to by this transaction, that it is affirmed, the tenant being placed in a situation different from that in which he would have been if the general proviso had been insisted upon.

In *Cronin v. Rogers* (1884), 1 C. & E. 348, a notice requiring a tenant to remedy a breach of covenant by repairing

the premises within three months expired on February 1st, 1884. No repairs were then done, and on February 2nd the rent due at Xmas, 1883, was accepted. It was held that the acceptance of the rent was no waiver of the breach of the covenant.

Coward v. Gregory, L. R. 2 C. P. 153, is a very important decision bearing upon the question of waiver in respect of the general covenant to repair. In that case the lessor engaged to put the whole of the demised premises in repair and to keep in repair certain portions thereof. Two breaches were assigned, the first for not putting the whole of the premises in repair, and the second in not keeping in repair the portions mentioned in the covenant in that behalf.

The first part was held not to be a continuing covenant, that that part of the covenant could only be broken once, and that damages under that breach was an answer to a subsequent action.

As to the second breach for not keeping the premises in repair, that was held to be a continuing breach for which prior action and recovery was no answer.

Penton v. Barnett, [1898] 1 Q. B. D. 276, is in some respects like the present case. It deals not only with the question of waiver, but also the notice required under sec. 14 of the Conveyancing Act, which corresponds in this respect to sec. 13 of the Landlord and Tenants Act. The lease contained a general covenant to repair and a covenant to repair within three months after notice. The premises being out of repair the lessor gave notice to the lessee under the Conveyancing Act of 1881, to repair within a given time. Three days after the expiration of the notice a quarter's rent became due. No repairs having been done by the tenant the lessor brought an action to recover possession, and in the action claimed the quarter's rent. It was held that the breach of covenant being a continuing one no new notice was required in respect of the non-repair after the expiration of the time specified in the notice, and that the claim for rent did not affect the right to possession in respect of the non-repair after the date when the rent fell due. The dates are material. The lease was granted in 1873. In 1896 the premises were confessedly out of repair, and on the 22nd of September the notice was given. The notice was given under the Act, and was so held, and claimed compensation, which could only be done under the Act. The

writ was issued on the 14th January, 1897, more than three months after the time mentioned in the notice had elapsed and rent was claimed up to the previous December 25th. The defence was that by bringing the action to recover rent which accrued due after the alleged cause of forfeiture by reason of the alleged breach of covenant to repair with knowledge thereof, the plaintiff had waived the alleged forfeiture, and was not entitled to recover possession of the premises. At the trial judgment was given for the defendant. On the argument it was urged that the plaintiff must be taken to have elected to treat the breach of covenant as a forfeiture. The premises were still out of repair. The appeal was allowed. A. L. Smith, L.J., after referring to the facts says: "It is perfectly well settled that the acceptance of rent is an acknowledgment of the existence of the tenancy, and if the case depended solely on that, I should have thought that the action was not maintainable; but it is pointed out that the claim for rent is at most an election to treat the defendant as tenant up to December 25th, and that, inasmuch as between that date and January 14th following, the premises were in the same state of disrepair in which they had previously been, there was a breach of covenant between those dates in respect of which the plaintiff could maintain his action for possession. In my opinion, apart from the Conveyancing Act, this contention is well founded. But then it is said that we must deal with sec. 14 of the Conveyancing Act, 1881. Under that Act a right of re-entry for breach of covenant is not enforceable unless the lessor serves on the tenant a notice specifying the particular breach complained of, so that the tenant may have a reasonable time to remedy the breach and make reasonable compensation to the lessor. The defendant had such a notice, and a reasonable time in which to comply with it; but it is said that the notice does not cover the breaches between December 25th and January 14th. In my opinion, this answer is insufficient, because the breaches during this latter period are the same as those in respect of which the notice was given." Rigby, L.J., said, "This is the case of a lease which contained two covenants as to repairs—one a general covenant to repair as occasion should require, the other to repair within three months after notice. The power of re-entry applies to breaches of either of these covenants. Independently of the Conveyancing Act, directly

the premises were out of repair the landlord had a right of re-entry under the lease; but he was not bound to re-enter on any particular day. At any rate, he had the power of re-entry so long as there was a broken covenant and a continuing breach. The position on January 14th, 1897, would be that, as nothing had been done since the notice as to repairs, the plaintiff had the right to determine the tenancy by the issue of the writ, and to sue in respect of such rights as had accrued to him during the tenancy." He then refers to sec. 14 of the Conveyancing Act, which was given on September 22nd, 1876, and states: "It cannot be doubted that the time indicated by the notice was a reasonable time, for it is the time specified in one of the covenants to repair contained in the lease. The action could, therefore, be maintained by the lessor—that is to say, the conditions imposed by the Act had been complied with, and for the purposes of this case the lessor was in the same position as if there had been no legislation. Then he brought his action for possession, and in it he claimed for a quarter's rent due on the previous December 25th. In my opinion, this claim does not constitute a waiver of the forfeiture. All that was laid down in *Dendy v. Nicholl*, 4 C B. (N. S.) 376, was that an action for rent was as good as a waiver of forfeiture as an action of ejectment was as a determination of the tenancy. If there had not been a recurring breach, but something which happened once for all, the state of things might have been different; but in this case, in my opinion, there is nothing in the statement of claim inconsistent with an election to determine the lease from December 25th." Collins, J., was of the same opinion: "It is not now denied that there was a breach which may be described as continuing or accruing day by day. That being so, but for the Conveyancing Act, there would be no answer to the claim for possession. Undoubtedly the words of the statute do give rise to the contention put forward on behalf of the defendant. It is said that the breach of covenant in respect of which this action to recover possession is brought is not the antecedent failure to repair in respect of which three months' notice was given on September 22nd, but the failure to repair day by day after December 25th, and that in respect of this a fresh notice must be given. If the section is to be construed with a great degree of strictness, that might be so. I think, however, that we ought to construe the words 'par-

particular breach' in the section according to the obvious intention of the Legislature, which was that the tenant should be informed of the particular condition of the premises which he was required to remedy. The expression "breach" means the neglect to deal with the condition of the premises so pointed out, and not merely failure to comply with the covenants of the lease. The common sense of the matter is, that the tenant is to have full notice of what he is required to do. He has had notice, and has failed to act on it; and with regard to that the physical condition of the premises which he was required to make good, was the same when the action was brought as when the notice was given. Under these circumstances, I agree that the requirements of the Conveyancing Act have been complied with, and that the tenant has, within the meaning of sec. 14, had notice of the breach of covenant which is the foundation of the action."

Fawcett in his able work on Landlord and Tenant, enumerates the instance in which a tenancy may be affirmed and forfeiture waived, p. 500, and says at p. 501, "Where a writ claims possession for the forfeiture and also arrears of rent accruing due subsequently to the forfeiture, the latter operates as a waiver of the forfeiture," *Bevan v. Barnett* (1897), 13 T. L. R. 310, "though if the breach is a continuing one as in the case of non-repair the lessor may still be entitled to forfeit in respect of the breaches subsequently to the date up to which rent has been claimed," *Penton v. Barnett* (supra).

As to the sufficiency of the notice, reference may be made to *Re Serle*, [1898] 1 Ch. 652. In this case the notice merely informed the lessee that "he is not keeping the said premises well and sufficiently in repair, and the party and other walls thereof." It was held insufficient as the notice did not direct the attention to the particular breaches complained of so as to give the tenant an opportunity of remedying them before action.

In Roscoe's *Nisi Prius*, 18th ed., 1034, it is said that a waiver of forfeiture incurred by a breach of a continuing covenant to repair is no waiver of a forfeiture for a subsequent breach, although merely a continuance of the original breach, citing *Doe d. Baker v. Jones*, 5 Ex. 498. In this case it was also held that where the covenant was to repair within a reasonable time and after breach the lessor received rent that he might bring ejectment immediately

thereafterwards. Platt, B., says, p. 505: "It is a fallacy to say that the receipt of rent was a waiver of the breach of contract to repair, for it was a continuing breach, and until the repairs were perfected, the lessors of the plaintiff were entitled to re-enter for the forfeiture." And it seems that if an act of waiver takes place one day a landlord may sue out a writ for a continuing breach on the next day. *Price v. Worwood*, 4 H. & N. 512. In this case on ejectment against a tenant for forfeiture for non-insurance brought on the 24th of December, it was proven that rent had been paid on the 23rd of December of the same year. Held, there was evidence from which the jury might presume a continuing breach of the covenant to insure on the 24th of December, at the time the action was brought.

In the present case the covenant to repair in its extended form is that the lessee will well and sufficiently repair, maintain, amend and keep said premises in good and substantial repair, when, where and so often as need shall be, reasonable wear and tear and damage by fire, lightning and tempest only excepted. Having regard to the authorities above referred to and the wording of the covenant to repair, I am clearly of opinion that here there is a continuing breach of the covenant to repair and that the effect of the notice was not a complete waiver of that covenant, but only delayed the right of action until after the expiration of the notice to repair, when the repairs not having been made the right of action for possession immediately accrued.

I am also of opinion that the notice given was sufficient under the thirteenth section of the Landlord and Tenants Act, and that the mere fact that it did not claim a certain sum for damages would not, I think, make it bad. The defendants had all the information which the Act requires to be given except as to damages and as to that I apprehend the plaintiff might waive his right so that the plaintiffs' right to bring this action was complete after the expiration of the notice. That having regard to the decision in *Penton v. Barnett* (*supra*), the right of action for possession was also complete after the expiration of three months from the giving of the notice under the covenant to repair according to notice, and that no further notice claiming the forfeiture was required. The notice in form was not limited

to either the statute or the covenant, and was, I think, sufficient under both.

Although there was thus in my opinion a forfeiture entitling the plaintiffs to possession the Court should, nevertheless, accede to the prayer of the defendants under subsec. 2 of sec. 13 of the Landlord and Tenants Act, and grant relief from the forfeiture.

I do not think effect can be given to the further contention of Mr. Armour that the removal of the wall was within the rights of the defendants under the lease. The wall was a part of the demise and the lessees thereby have "the right and liberty to maintain, continue, use, build, and rebuild such wall . . . subject to the lessee assuming the obligation, if any, existing on the part of the grantee under the said deed or the lessor to maintain or repair the said wall as appurtenant to the land hereby demised." So far from this clause having the effect contended for it rather imposes upon the lessees and their assigns to maintain and repair it. It creates an obligation to maintain it instead of liberty to remove it. I am further of opinion that the receipt of rent without prejudice to the plaintiffs' rights precludes the contention that the receipt of sums equivalent to the rent was a waiver of the plaintiffs' rights of forfeiture in the lease.

I think the terms imposed by the trial Judge to restore the wall within three months are reasonable and appropriate. The time may be extended for that period from the date of this judgment, and in default of restoration within the time limited, the plaintiffs should be entitled to recover possession of the premises.

Objection was taken to the sufficiency of the notice which was signed by Mr. Thomson on behalf of the trustees. This objection is, I think, untenable. It was given by one trustee and adopted by all, and being sufficient under the statute the objection fails.

Even should it be held that there was no forfeiture giving a right of re-entry, I am of opinion, that the plaintiffs would be entitled to the relief given by the trial Judge, first because waste had been committed of such a nature that under the circumstances a mandatory order to restore the wall would be the only sufficient and appropriate remedy. See the *Encyclopædia of the Laws of England*, vol. 14, p. 587; *Fawcett's Landlord and Tenant*, 3rd ed., 348, 350;

Woodfall's Landlord and Tenant, 18th ed., 695; Kerr on Injunctions, 4th. ed., 51 (a) 431, 432. Secondly, upon the ground that a sufficient notice having been given to repair, and the repairs not having been made within the time limited by the notice, a right of action arose under that covenant, not only of forfeiture, but also, if forfeiture for any reason was not available to the plaintiffs, for other relief and for which the appropriate remedy would be to restore the wall. See Fawcett on Landlord and Tenant, 3rd ed., 367, 373, and 375. At p. 338 it is said: "It is a breach of this covenant to pull down the demised premises either wholly or partially, or to open a doorway in a wall," *Gange v. Lockwood* (1861), 2 F. & F. 115; *Doe v. Jackson* (1817), 2 Star. 293, and other cases there cited.

In *Allport v. Securities Corporation* (1895), 64 L. J. n.s. Chy 491, a tenant was in possession of rooms on the fourth and fifth floors of certain premises for residential purposes, with the use of the entrance hall, staircase, and lift. The landlord without the consent of the tenant, and during his temporary absence, proceeded to make structural alterations in the premises, including (*inter alia*) the removal of the staircase, the tenant's access to his rooms now being by another staircase, which was a circuitous and less convenient route. On motion for injunction by the plaintiff the Court granted a mandatory order against the landlord to reinstate the staircase. North, J., said: "I think I ought to grant a mandatory injunction. It is quite clear, in my opinion, that the defendants have not any right to act as they have done. It is said that they may be able to find more evidence in their favour before the trial of the action, but I do not think they could find more than they have at present. Again, it is said that a mandatory injunction ought not to be granted on this motion, or indeed at any time, requiring the defendants to reinstate what they have pulled down. I refer to the case of *Lane v. Newdigate*, 10 Ves. 192, where, although the order specifically to repair the banks of a canal and stop gates and other works was refused, the Lord Chancellor said: 'So, as to restoring the stop gate, the same difficulty occurs. The question is, whether the Court can specifically order that to be restored. I think I can direct it in terms that will have that effect. The injunction I shall order will create the necessity of restoring the stop gate, and attention will be had to the manner in which

he is to use these locks, and he will find it difficult, I apprehend, to avoid completely repairing these works'—that is, the order would create the necessity of restoring the stop gate and works." In *Rankin v. Huskisson*, 4 Sim. 13, an injunction was granted on interlocutory application before answer, restraining the defendants from permitting to remain erected such part of certain buildings as had been erected in violation of the agreement between the plaintiff and the defendants, and in the case of *Morris v. Grant*, 25 W. R. 55, the defendant, having after express notice erected a porch in breach of a covenant, was on motion ordered to remove the erection, although it had been completed before the filing of the bill. "It is suggested that the plaintiff ought to have damages if any relief is granted, but, in my opinion, it is a case in which he has a right to say that his rights shall not be interfered with in a high-handed manner in his absence. I think it is a case which should be decided at once, and therefore I make the order now instead of directing that the motion to stand to the hearing." See, Lord Esher's observations on *Lane v. Newdigate* in *Ryan v. Mutual Tontine Assn.*, [1893] 1 Chy. 124.

As to the question of costs allowed below between solicitor and client, it was urged that the trial Judge had no jurisdiction to impose such costs, and Mr. Tilley was unable to cite any authority where they had been allowed in a case similar to the present.

In *Andrews v. Barnes*, 39 C. L. D. 133, it is said that the Court of Chancery had, and the High Court of Justice has, in matters of equitable jurisdiction a general discretionary power to give costs as between solicitor and client. "The giving of costs in equity," said Lord Hardwicke, in *Jones v. Coreter*, 2 Atk. 400, "is entirely discretionary, and is not at all conformable to the rule at law." The former rule in the Chancery Court above indicated is in effect the present rule now applicable to all Courts. Nevertheless, even in equity costs as between solicitor and client were not given except in special cases such as suits affecting charity funds, administration suits, accidents brought by trustees and in certain cases of mis-conduct, and where an arbitrator had power to dispose of the question of costs. In *Cockburn v. Edwards*, 18 Chy. Div. 449, it was held in appeal that the difference between solicitor and client costs and party and party costs in an action cannot be given by

way of damages in the same action, the latter being all that the successful suitor is entitled to. In *Willmott v. Barber* (1881), W. N. 107, it was held that the Judge had no jurisdiction to impose costs by way of penalty beyond the costs of the suit. See *Morgan on Costs*, 2nd ed., 5. In the present case it is true that the plaintiffs are trustees, but the action is not brought in respect of the trust or arising out of the will. The plaintiffs' claim is as landlords. I have been unable to find any case such as this, where costs between solicitor and client have been given. It does not fall within the class of cases where such costs have been allowed, nor do I think the rule should be extended.

With deference, I think the trial Judge was in error in finding that there was a waiver of the forfeiture to re-enter. The covenant to repair, which includes the keeping of the premises in repair is a continuing covenant, and the effect of the notice to repair was not a waiver once for all of the general covenant, but an election that the plaintiffs would not take advantage of it during the currency of the notice to repair and after the expiration of that notice the plaintiffs had the right to re-enter if the premises continued out of repair. The same may be said of the covenant to repair according to notice. Default in complying with the notice gave the right of re-entry after the expiration of the time limited by the notice. The notice was sufficient under sec. 13 of the L. & T. Act, giving all the information required; and no subsequent notice was, in my opinion, necessary.

The premises being admittedly out of repair the right of re-entry was complete and the plaintiffs are entitled to succeed upon their cross-appeal.

Relief may be granted to the defendants' prayer under sub-sec. 2 of sec. 13, and the only appropriate relief in my view is the restoration of the wall within a reasonable time. Three months, I think, is a reasonable time, and that may be extended from the date of this judgment. Aside from the question of forfeiture the taking down of the wall under the circumstances was, in my opinion, waste, the appropriate remedy for which was the restoration of the wall within the time limited by the trial Judge.

The costs below should be that allowed between party and party; the time for completing the repairs to be extended to three months from the date of this judgment. With this variation of the judgment below the plaintiffs' appeal

is allowed with costs and the defendants' appeal dismissed with costs.

HON. MR. JUSTICE MIDDLETON:—It is desirable to state accurately and at some length the exact contention made by the defendants' counsel before dealing with the cases. His contention may, I think, be put thus:—

The lease contains two covenants; a covenant to repair, and a covenant to repair on three months' notice. On a breach of either, the landlord has the right to forfeit.

No action can be brought to enforce a forfeiture unless and until the notice required by the statute is given. This notice must be given after the breach which brings about the forfeiture. Assuming that what is alleged is a breach of the covenant to repair, the landlords had two courses open. They might treat the breach of the covenant as working forfeiture, and give notice required by the statute, so that they might re-enter by virtue of the forfeiture or they might elect to waive the forfeiture and to continue the tenancy. By giving the notice under the covenant to repair according to notice, the landlords, it is said, have adopted the latter course, and cannot be heard to say that the term which they have by the giving of that notice elected to treat as existing, was forfeited and ended by the prior breach of the covenant to repair.

This does not mean that the landlords are without remedy. They could, before the statute, after the three months bring ejectment either on the breach of the covenant to repair according to notice or by reason of the continuing breach of the covenant to repair, and, since the statute, upon the terms prescribed by the statute, i.e., upon reasonable notice of his intention to forfeit they may avail themselves of any forfeiture which has taken place since the waiver of the particular forfeiture by the notice in question.

The plaintiffs contend that the notice which was given can be regarded as a notice under the statute as well as under the covenant. It is said that a moment's consideration will shew that this cannot be, because the notice under the statute is an election to forfeit, and the notice under the covenant is an election to waive the forfeiture. A notice may be so vague and ambiguous that it may be difficult to ascertain the landlord's real intention; but no notice can be supposed to express these two opposite and conflicting

ideas. When the notice is ambiguous it must be construed against the landlord who gave it, and the tenant is entitled to regard it as a notice under the covenant if it is capable of being so construed. No one reading the notice here given can doubt that it is an apt notice under the covenant, and it must be so treated; and it is not important that possibly the notice might have answered as a notice under the statute if there had been no second covenant in the lease and so no ambiguity.

This is a fair summary of Mr. Armour's very able argument upon that branch of the case.

Turning then to what has been decided: In *Doe v. Meux* (1825, 4 B. & C. 606, an action was brought after the giving of notice and before the expiry of the three months.

Bayley, J., said:—

“The landlord in this case had an option to proceed on either covenant; and after giving notice to repair within three months he might have brought an action against the defendant upon the former covenant for not keeping the premises in repair. But that is very different from insisting upon the forfeiture. It is said that, the premises being out of repair on the 6th August, when the notice was given, the lease was thereby forfeited. But the landlord has affirmed that the lease subsisted up to the 29th September, by receiving the rent which came due at that period. It is plain, therefore, that he did not intend to insist upon an immediate forfeiture at the time when the notice was given; and I think the notice amounted to a declaration that he should be satisfied if the premises were repaired within three months, and that he thereby precluded himself from bringing an ejectment before the expiration of that period.”

Holroyd, J., said:—

“It appears to me that the notice requiring the tenant to repair within three months was equivalent to an admission that the tenancy would continue up to the end of that time. If it did not amount to a waiver of the forfeiture incurred by breach of the covenant to keep the premises in repair, the landlord might be able to bring ejectment after the tenant had put the premises in repair pursuant to the notice; which would be extremely unjust. But I think that although the action for breach of the covenant would remain, yet the forfeiture was waived.”

In addition to what I have quoted, the earlier case of *Doe v. Paine*, 2 Camp. 520, is distinguished upon the ground that the notice given was a notice to repair forthwith. And in *Few v. Perkins* (1867), L. R. 2 Ex. 92, a somewhat similar notice is regarded in the same way. The notice was vague and general and was not an election of the landlord to waive the forfeiture, because there could not be found in it anything necessarily referable to the latter covenant or making it anything more than "the usual though not necessary course of giving the tenant notice to repair," given as a matter of courtesy before bringing ejectment.

In *Doe v. Lewis* (1836), 5 A. & E. 277, the covenants were slightly different, but the principle is the same. Denman, C.J., says:—

"The non-repair was proved, but the original lessor had reserved to himself a particular remedy in case of non-repair . . . If the reversioner takes upon himself to repair, under a proviso like this, he waives the forfeiture for breach of condition . . . The lessors of the plaintiffs, by giving the notice of November, took into their own hands a remedy inconsistent with the right to insist on a forfeiture."

Littledale, J.:—

"By giving the notice under the latter proviso, the lessors of the plaintiff have waived their right of proceeding under the general power."

Patteson, J., accepts the judgment of Holroyd, J., in *Doe v. Meux*, as establishing that "the party by proceeding on the special proviso waives his right to proceed on the general one," and refuses to regard *Doe v. Paine* as authority to establish that "such provisos as these are independent, so that ejectment may be maintained on the one, though recourse has been had to the other;" for the very reason above indicated, that the notice was not in that case sufficiently definite to enable it to be said that recourse had been had to the other.

So far Mr. Armour's argument is borne out by the cases. The fallacy comes when he deals with the statute. The statute does not require that the notice should be given after the right of re-entry has arisen. It must be given after the act or neglect upon which the right to re-enter arises, but it may be given before the forfeiture takes place.

The covenant to repair is a continuing covenant, and each day that there is a state of non-repair, constituting a

breach of the covenant, there is a right of entry and a right to forfeit the lease.

Assuming that on the 16th July, 1909, there was a breach of the covenant to repair and that the notice then given was a waiver of the forfeiture that had taken place, and by reason of the recognition of the existence of the term for three months precluded the landlords from acting on any breach of the covenant to repair during the three months, it does not preclude them from acting upon the subsequent breaches and on the right of entry arising from day to day during the period that elapsed from the expiry of the three months to the bringing of the action.

Then does the statute preclude the landlords from bringing the action without a new notice? I think not. We must be on our guard against reading into a statute more than it contains. What it requires is that before the landlord asserts the forfeiture he shall have given notice, not of his intention to forfeit, as is argued, but of his desire to have the covenant lived up to; drawing attention to the particular thing which the tenant has done or left undone. The notice does not need to be an election, but is to serve as a warning to the tenant so as to prevent him being taken by surprise.

This construction of the Act was adopted in the Court of Appeal in *Penton v. Barnett*, [1898] 1 Q. B. 276. There a notice was given under the Act. Then rent was demanded down to a period long subsequent to the notice and any forfeiture was waived. The non-repair continued; and it was said that a new forfeiture took place because the covenant was continuing, and there was a new breach every day. This case also determined that the statute, though requiring a notice of the "particular breach complained of," did not require a notice of the "breach" in the legal significance of that term, but of the physical condition of the premises which the tenant was required to make good; and it also determined, in the third place, that such a notice might be well given before the "breach" in the legal sense upon which the right to forfeit and re-enter is based.

The question then resolves itself into the narrower one: Was what was done a breach of the covenant?

The Crown leased to Jamieson on the 27th June, 1899, a vacant lot at the corner of Queen and Yonge streets, "together with a wall eighteen inches thick," described in a

deed of 19th July, 1867, "as projecting nine inches upon the next adjoining land to the north, and the right and liberty to maintain, continue, use, build, and re-build such wall as granted to the Board of Agriculture for Upper Canada by virtue of the provisions of the deed."

The deed of 19th July, 1867, referred to, is one by which McIntosh, the owner of the lands in question and the lands to the north, conveyed to the Board the lands in question, "with the right and liberty to maintain and continue the wall of the building erected by the Board" "as it now projects, and hereafter from time to time to build the wall of any building which hereafter may be built by" the Board "their successors or assigns, projecting nine inches upon the next adjoining land." to the intent that the wall may be used as a party wall.

In the lease Jamieson covenants to erect a building costing \$25,000 in accordance with plans to be approved by the lessor.

The building actually erected cost very much more than this. The north wall consists of the old party wall and an extension upward. The wall had not sufficient strength to carry the floors of the building. so that a steel structure was adopted; and the only function of the wall is that of a partition between the southern building and the building to the north.

There is a right of renewal for a certain time; and on the termination of the term the landlord is to pay the tenant the actual value of the building at the time the lease terminates.

The tenant having acquired a lease of the building to the north, with the consent of the landlord of that building has removed part of the wall. so as to enable the ground floor to be used as one store. This does no real harm to the plaintiffs, in view of the long lease (105 years) and the fact that the building is the tenant's and is to be paid for on the footing of its actual value.

The wall in question is not the tenant's, but the amount that its restoration will cost is very small compared with the value of the rest of the building.

If the covenant prevents its removal, then the plaintiffs have the right to assert the covenant, even though the advantage to them bears no comparison to the injury to the defend-

ants. The familiar case found in Æsop does not indicate that the Court can interfere upon this ground.

Mr. Armour's contention is that the act complained of here does not come within the covenant. The covenant is aimed at permissive waste. The act done is voluntary waste, and the remedy is in damages only.

This contention is supported by *Doe dem. Dalton v. Jones*, 4 B. & Ad. 126, L. J. 2 Q. B. 11. There a dwelling was turned into a store. A window was enlarged and a door in an inside partition was closed and another door opened. This was found to be no breach of the covenant to repair, "the effect of which was merely that the tenant should supply the ordinary wear and tear of the premises."

Holderness v. Lang, 11 O. R. 1, deals with the same question; and I must confess that a careful perusal of it leaves my mind in much confusion as to what was really decided.

The covenants in the lease contemplate the erection of buildings and the making of changes by the tenant. The \$25,000 building to be erected at the beginning of the term (lasting, including renewals, 105 years) would not remain suitable for all purposes throughout the term without alteration.

The extended covenant to repair calls upon the tenant to "well and sufficiently repair, maintain, amend and keep" the demised premises. The covenant in *Doe v. Jones* was to "repair and keep repaired." Armour, C.J., in *Holderness v. Lang* was "inclined to think what was done by the defendant was not a breach of the covenant" there, which was the same as that here; and in appeal Wilson, C.J., says: "I am inclined to think the lease before us is substantially like the lease just referred to." Neither Judge places his decision upon this ground.

Bearing in mind that what was demised was the wall and not the building, and that here the covenant is to "maintain, amend and keep" it, I cannot agree that this lease is substantially the same as the lease in *Doe v. Jones*. And it seems to me that the removal and destruction of the party wall is a breach of the covenant to "maintain" it.

Doe dem. Vickery v. Jackson, 2 Stark 293, is in point. and is cited with approval in all text-books.

I notice that in *Holderness v. Lang*, it is said that the covenant is not a continuing covenant, and that the breach once made and waived cannot be relied on. This is in con-

flict with the weighty cases before quoted in dealing with this question.

So far as the contention made by the plaintiffs that restitution ought to be ordered is concerned, in specific performance of the covenant to repair, I am quite unable to assent. Platt (covenants) p. 293, states: "The rule may now be taken to be established that equity will not decree specific performance of a covenant to repair, but will leave the party to recover damages in an action at law." This rule, so far as I can ascertain, has never been broken in upon, and applies also to waste. I mention this, that my position may be clear; but as my judgment does not turn upon this I do not discuss the cases.

There being, therefore, a breach of the covenant, and forfeiture, I agree with the terms suggested by my brother Clute upon which the defendants may be relieved.

I also agree that there was not power to order payment of solicitor and client costs, save as the price of indulgence, and that they should not be so awarded in this case.

Since the above was written I have had my attention called to *Rose v. Spicer*, [1911] 1 K. B. 234, which is much in point.

HON. MR. JUSTICE LATCHFORD:—I concur.

MASTER IN CHAMBERS.

FEBRUARY 21ST, 1912.

CARRY v. TORONTO BELT LINE CO.

3 O. W. N. 751.

Discovery—Production of Documents—Action on Judgment and for Receiver—Enquiry as to Property of Judgment Debtors—Company—Production of Minute-books and Documents.

Motion by the plaintiff for further and better affidavit on production from the defendants.

M. Lockhart Gordon, for the plaintiff's motion.

F. McCarthy, for the defendants, contra.

CARTWRIGHT, K.C. MASTER:—The action is on a judgment against the defendants recovered on 9th June, 1893,

for a sum which with interest amounted to nearly \$5,000 at the issue of the writ herein in June last.

The plaintiff claims (1) the appointment of a receiver; (2) full discovery by defendants of their real and personal property, and (3) a sale of the line and reference to ascertain prior encumbrances; (4) reference to ascertain value and amount of the property of the defendant company exigible under the plaintiff's judgment.

The company was incorporated by the Act 52 Vict. (Ont.) ch. 82.

The affidavit already made by the secretary of the defendant company produces only 3 documents:—

(1) Agreement dated 20th June, 1890, between the defendants and the G. T. R.

(2) Agreement dated 28th February, 1891, between the defendants and the G. T. R.

(3) Mortgage deed of trust dated 2nd April, 1890, between the defendant company and two trustees.

A copy of this last document has been put in. It recites the agreement of 20th January, 1890, and states that it was as well a lease for 40 years from 1st July, 1891, to the G. T. R. at a rent of \$18,500. payable half-yearly as an agreement with the G. T. R. to mortgage the property and franchise of the defendant company to secure an issue of \$650,000 first mortgage bonds payable in 40 years from date of issue with interest at 4 per cent. half-yearly and that of these \$462,500 should be used by the defendant company for the construction of the road (the interest on this at 4% being exactly \$18,500.)

Reference to the Act of incorporation shews that by sec. 15 the above agreement had to be approved of at a special general meeting of the shareholders called for that purpose. It seems to follow from this that the defendant company must produce its minute books and all other material necessary to shew that the terms of the act of incorporation in this respect were complied with.

It was further contended by Mr. Gordon that the accounts of the defendant company should also be open to his inspection. He supported this argument by the fact that the plaintiff asked not only payment of his admitted judgment but also the appointment of a receiver and discovery as to assets and liabilities to enable the Court to see if it was a proper case for a receiver. He cited Bray on

Discovery, pp. 571, 609, and cases cited. See too, Yearly Practice (red book) 1912. vol. 1, p. 370.

The appointment of a receiver is a matter of discretion. Such a remedy is only granted on a proper case being made for the interference of the Court. On the principle that discovery extends to everything that may, not which must, assist the case of the applicant, it would seem that here the plaintiff is entitled to all such production and examination as will shew whether he has made out his case for the relief he asks under any of the branches of the prayer for relief in the statement of claim.

This is analogous to the examination of a judgment debtor as pointed out in *Bray (supra)*, pp. 570, 571, in the chapter entitled "Discovery in Aid of Execution."

The order should go, with costs in the cause, as the point is now so far as appears.

HON. MR. JUSTICE MIDDLETON. FEBRUARY 21ST, 1912.

CLARKSON v. McNAUGHT AND SHAW.

(AND THREE OTHER CASES.)

3 O. W. N. 741.

Appeal — To Divisional Court — From Judge in Chambers—Motion for Leave to Appeal—Summary Judgment—Action on Promissory Note.

MIDDLETON, J., refused leave to appeal from judgment of Britton, J., 21 O. W. R. 269, affirming order of Master-in-Chambers, 21 O. W. R. 198.

Application by the plaintiff for leave to appeal from the order of HON. MR. JUSTICE BRITTON, 21 O. W. R. 269, dismissing an appeal from the order of the Master in Chambers, 21 O. W. R. 198, refusing to grant summary judgment under Con. Rule 603.

F. R. Mackelcan, for the plaintiffs' motion.

F. Arnoldi, K.C., for the defendants, contra.

HON. MR. JUSTICE MIDDLETON:—I have very carefully considered this application. I do not think that leave to appeal should be granted.

I base my judgment upon the fact that the matters involved are too important and too difficult to fall within the scope of the rule in question.

It must be borne in mind, in dealing with applications under this rule, that the right of appeal is very limited, and that these and similar considerations have led to the rule being so restricted in its application as to render the summary procedure thereby provided available only where there is no real question either of law or fact between the parties.

It is sought to treat this application as one to enforce an undertaking given by counsel that judgment should be entered upon these notes if the plaintiff is found entitled to recover in the action of *Stavert v. McMillan*.

A very serious question is suggested by counsel for the defendants as to the effect of this undertaking, in view of the transactions which took place in July and August, 1911, long after its date. By the agreements then entered into the title to the notes in question has become vested in Clarkson; but it is alleged that Clarkson has not succeeded to all the rights of Stavert, and that in truth he has no greater right than the Sovereign Bank itself, and that neither he nor the Sovereign Bank can enforce the notes in question. These questions are not only important but difficult, and clearly are not such as ought to be dealt with upon a mere Chamber motion, but such as should be disposed of so as to permit the most ample consideration and to give the freest and most untrammelled right of appeal.

Apart from this. I do not think a motion to enforce such an undertaking could properly be made in Chambers, either before the Master or before the Judge. The undertaking may be enforced upon a summary application to the Court—*Pirung v. Dawson*, 9 O. L. R. 248—or may be enforced by action. In either case the judgment will be free from the trammels placed by our rules upon the right to appeal from Chamber orders.

In this case the parties will be well advised if the question of the validity and effect of the undertaking is raised by the pleadings, so that it can be dealt with at the trial; because it does not appear to be a matter that can be satisfactorily dealt with upon a summary application.

The motion will be refused; costs to the defendants in any event.

A cross-application for leave to appeal from the terms of the order of Hon. Mr. Justice Britton will also be refused; costs to the plaintiff in any event.

HON. MR. JUSTICE RIDDELL.

FEBRUARY 14TH, 1912.

DIVISIONAL COURT.

MARCH 12TH, 1912.

RE DENTON.

3 O. W. N. 678.

Will—Construction—Motion for under Con. Rule 938—Legacy of Annuity—Legatee Predeceased Testator—Gift of Annuity Failed—Bequest of Annuity during Lifetime of Widow — Death of Annuitant after Testator's Death, but before Widow's—Personal Representative Entitled—Specific Legacy of \$500—Vested Gift—Children of Legatee Entitled to Gift — Legatee Predeceasing Testator—Grandchildren of Legatees do not Take in Competition with Children—Cost of all Parties out of Estate.

Motion by Eleanor Bolland, Edna Bolland and Isabella Bolland, infants, for an order under Con. Rule 938, construing the will of the late John M. Denton, who died March, 1896, leaving a will dated June, 1889, the provisions of which were as follows:—

“I give devise and bequeath to my friends John W. Jones and William M. Moore of the city of London, Esquires, all my real estate and remainder of my personal property of whatever nature or kind, and wheresoever situated upon the following trusts:

1. To sell and dispose of my real estate or any part thereof and to convert my personal property into cash as soon after my decease as my said trustees or the survivor of them may think proper so to do and until such sale to lease all or any portion of my said real estate.

2. Out of the proceeds of my personal property to pay to the Protestant Orphans Home of London, Ontario, the sum of three hundred dollars.

3. Out of the remainder of the proceeds of my said personal property and of the proceeds derived from such sale and leasing of my real estate as aforesaid to pay to my said nephew Edward A. Denton, the sum of three hundred dollars.

4. To pay to my sister, Naomi Dickenson, the sum of one hundred dollars per annum during the lifetime of my dear wife.

5. To pay to my sister, Mary Bolland, during the lifetime of my said wife, the sum of one hundred dollars per annum.

6. After payment of the legacies before mentioned, and of my lawful debts, I desire my said trustees or the survivor of them to invest the remainder of my said estate in good

securities and to lease such portion of my property as shall not be sold and to pay the interest and proceeds derived therefrom to my dear wife by quarterly payments during her life.

7. After the death of my said wife to sell and dispose of all my real estate and property then unconverted and to pay to my sister, Naomi Dickenson, and to Mary Bolland each the sum of five hundred dollars to divide the remainder equally amongst all my brothers and sisters, including the said Naomi Dickenson and Mary Bolland share and share alike.

8. Should any of my brothers or sisters die before the final division of my estate, leaving lawful issue, then and in such case I desire that the share which such deceased brother or sister would have been entitled if living shall be divided equally amongst the children of such deceased brother or sister so that such child or children shall take the portion to which his, her or their parent would have been entitled if living.

9. I appoint the said John W. Jones and William M. Moore executors of this my will."

The widow died November 23rd, 1910.

Naomi Dickenson died July 17th, 1892, leaving her surviving a number of children eight of whom survived the testator, and seven are still living; others of her children died leaving children and others grandchildren.

Mary Bolland survived the testator, but died before the widow. Some of her children died before her leaving children, and some of these children died leaving children.

Samuel Denton and William Denton, brothers of the deceased, died after the testator, but before his widow Samuel, leaving a number of children; some of whom have died leaving children, William leaving one child, who also died before the widow.

Jethro Denton is still alive. These are all the brothers and sisters of the testator, viz., (1) Naomi; (2) Mary; (3) Jethro; (4) Samuel; (5) William.

E. W. M. Flock, for the applicants.

M. D. Fraser, for all other beneficiaries.

J. P. Moore, for the executor.

HON. MR. JUSTICE RIDDELL:—The first question is: "Has the annuity to Naomi Dickenson given by the 4th clause lapsed, she having predeceased the testator?"

Before the Wills Act, there can be no doubt that there was a lapse in such cases; and the Wills Act does not operate to prevent it in the present case. R. S. O. (1897) ch. 128, sec. 36, applies only when the intended beneficiary is a "child or other issue of the testator." This proposed gift, therefore, fails entirely. The fact that it is an annuity and not a fixed sum is immaterial: *Smith v. Pybus* (1804), 9 Ves. 566, at p. 575, per Sir William Grant, M.R.

2. The second question is as to the \$500 left to her specifically in clause 7, and this question must be answered in the same way and for the same reasons.

3. The third question is "Mary Bolland having survived the testator, and so having become entitled to the annuity under clause 5, but dying before the widow, what becomes of the annuity between the death of Mary Bolland and the widow?" As far back as 1687 Lord Jeffries, L.C. (whose ability and merits as a Judge in purely civil matters have not received the recognition they deserve) in *Gifford v. Goldsey* (1687), 2 Vern. 35, decided that if a man possessed of a term of years determinable in lives devised £20 per annum to J. S. to be paid out of this estate if the cestui que vies should so long live and J. S. die in the lifetime of the cestui que vies, the annuity is payable to his executors during the remainder of the term.

In 1710 Lord Keeper (Sir Simon Harcourt, afterwards Lord Harcourt, L.C.), in *Rawlinson v. Duchess of Montague* (1710), 2 Vern. 667, held that in a bequest of £50 per annum to his executors during the lifetime of the Duchess of Montague, the wife of the testator, to be for the separate use of Mrs. R., and Mrs. R. died during the lifetime of the Duchess, the annuity should be paid to the executors of Mrs. R. during the Duchess' lifetime.

The same learned Lord Keeper decided that in a devise of a lease to A. for life A. to pay an annuity of £10 to B., her son during her life—if the son B. died before A. his mother, the annuity still continued during A.'s life and became payable to the executors of B: *Lock v. Lock* (1710), 2 Vern. 666.

Lord Hardwicke, L.C., followed the first mentioned case (and 1 Rolle's Abr. 831. pl. 5) in *Savory v. Dyer* (1752), Dick. 162, Amb. 139. There R. W. by will gave to J. S. a kinsman during the natural life of his executor, one annuity or yearly sum of £50 to be paid him by his executors. J. S. died; the plaintiff was his executor; and it was adjudged

that the plaintiff was entitled to the annuity during the lifetime of the executor.

In the report in *Dickens* the L. C. is made to say, "if a personal annuity is given to A. it shall go to him for life only." No such expression is found in Amber's report.

The expression was quoted in argument in *Re Ord* (1878), L. R. 9 Ch. D. p. 667, at p. 671, thus, "As to the annuity, that was a gift to the son for his personal advantage and it could not be made to extend to a period beyond his life: *Savory v. Dyer*:" but this argument was not acceded to by V.-C. Hall, and the Court of Appeal (1879), 12 Ch. D. 22, supported the Vice-Chancellor's decision.

In that case there was a provision that A., if he should attain the age of 21 years should be paid £40 annually from his majority to the death or marriage of the widow. He attained the age of 21 years and died in the lifetime and widowhood of the widow. Hall, V.-C., 9 Ch. D., at p. 673, says: "I must give full effect to the language of the will, and I hold that the annual payment of £40 was to continue . . . and that it is now payable to his legal personal representative during the lifetime of the widow in her widowhood." James, L.J., says, 12 Ch. D., at p. 25: "It has never been doubted that the gift of an annuity for a term or *pur autre vie* is a gift to the annuitant and his personal representatives during the term or the life of the *cestui que vie*." Baggalay, L.J., was at one time . . . disposed to think that it was intended only for the personal enjoyment of the son (A). "But on further consideration I have come to the conclusion there is no such limitation." Thesiger, L.J., concurred.

Lewis v. Lewis (1848), 16 Sim. 266, is another very strong case. The testator directed the executors to pay £300 per annum toward maintenance, clothing, and education of all and every, the children of his eldest son in equal shares during the son's life. The son had three children all of whom attained the full age of 21 years—then one died and the others claimed that as he had no further need for "maintenance, clothing, and education," they should have all the annuity. But the V.-C. (Shadwell), held that the personal representative of the deceased child was entitled to be paid one-third of the £300, during the lifetime of the father (the eldest son of the testator).

The same rule is laid down in *Attwood v. Alford* (1866), L. R. 2 Eq. 479, "a gift of the income to arise from a fund

during the life of A. to B. for his maintenance is an absolute gift to B. his executors and administrators during the lifetime of A. and is not confined to the joint lives of A. and B.;" per Lord Romilly, M.R.

The authorities are perfectly clear and are consistent in the one sense from the earliest times—and I am bound by them to hold that the personal representatives of Mary Bolland are entitled to the \$100 a year from her death till the death of the widow.

4. "Mary Bolland having survived the testator, but dying before the wife, what becomes of the \$500 legacy to her contained in the 7th clause?"

That the rules of Vesting applicable to bequests of personalty also apply to realty directed to be converted is quite clear. Theobald, Can. ed., p. 580, ad fin. One of these rules is: When the only gift is found in the direction to pay (as in this instance) and the postponement is merely on account of the property as for example, if there be a prior gift for life, the gift in remainder vests at once.

Bennett's Trusts, 3 K. & J. 280; *Strothers v. Dutton*, 1 D. & J. 675; *Parker v. Sowerty*, 17 Jur. 752; *Adams v. Robarts*, 25 Beav. 658, but the vesting is postponed if the payment deferred for reasons personal to the legatee.

Hanson v. Graham, 6 Ves. 239; *Locke v. Lambe*, L. R. 4 Eq. 372; *Surell v. Dee*, 2 Salk. 415, is an anomalous case and has no bearing upon the present will.

I think that the legacy vested at the death of the testator, and the \$500 is payable to the personal representative of Mary Bolland.

5. "Are the 'children' of Naomi Dickenson (who died as we have seen before the testator) entitled to share, under the provisions of clause 8 in the remainder of the fund formed under clause 7?"

It is to be observed that the gift to children is substitutionary and not substantive—the testator does not say "to my brothers and sisters then living, and the children of those then dead," but the children are beneficiaries out of that which the parent would have received if living.

In *Ive v. King* (1852), 16 Beav. 46, Romilly, M.R., said (p. 53): "If a testator give a legacy to a class of persons such as the children of A. and goes on to provide that in case of the death of any one of the children of A., before the period of distribution, the issue of such child shall take

their parent's share such issue cannot take unless the parent might have taken; and consequently if a child of A. be dead at the date of the will or at the death of the testator, the issue of that child cannot take anything." And he quotes *Coulthurst v. Carter*, 15 Beav. 421; *Peel v. Catlow*, 2 M. & K. 41; *Waugh v. Waugh*, 9 Sim. 372; *Christopherson v. Naylor*, 1 Mer. 320.

The same rule is laid down in *Congreve v. Palmer* (1852), 16 Beav. 435, by the same learned Judge.

In *In re Potter's Trusts* (1869), L. R. 8 Eq. 52, there was a bequest to the testator's "nephews and nieces . . . in equal shares," and in the case of the death of any of these leaving issue, such issue were to take the share the deceased parent would have taken if living.

Malins, V.-C., regretting such cases as *Christopherson v. Naylor*, "by which the testator's intention has been totally frustrated, when a yielding to a common-sense view would have carried it out," and following what he "must call the rational construction," holds that "a child of a nephew or niece who was dead at the date of the will is as much entitled to take as the child of a nephew or niece who died after that time, but before the testator, and that in both cases the child will be substituted for its parent."

This case is explained in *Re Hotchkiss's Trusts* (1869), 8 Eq. 643, where James V.-C., says "*In re Potter's Trusts* and the cases which it followed words occurred which were sufficient to satisfy the Court that the gift was not a gift to a class followed by a substitution or other persons for dying members of that class, but that it was a gift which upon fair principles of construction could be made out to consist of a gift to two classes; first to one class of children or nephews; and then to the issue of another class of children or nephews."

The learned V.-C., goes through the cases and holds that *Christopherson v. Naylor*, is still of authority.

But while the cases upon which *Ive v. King* is based have been attacked, I cannot find that the case itself has been questioned, or the principle which I have quoted disapproved, but the reverse. Long before, and in *Thornhill v. Thornhill* (1819), 3 Madd. 377, the will contained a direction that certain land should go to the wife for life, sold as soon as might be after the decease, and the money arising therefrom equally divided among the nephews and nieces of

the testator, "the children of such as should be then dead standing in the place of their father and mother deceased." Certain of the nephews and nieces died during the testator's lifetime leaving children, and the question was, did these children take? Sir John Leach, V.-C., held that the gift must necessarily be confined to nephews and nieces living at the death of the testator, and that they were to take only if they survived the wife, and that if they died after the testator and before the wife, then their children were to stand in their place."

This case was approved and followed by North, J., in *In re Hannan* (1897), 2 Ch. 39, the last case I have seen on the point. The learned Judge points out that in *Smith v. Smith*, 8 Sim. 357, the V.-C., (Sir Lancelot Shadwell), does say: "I think the decision in *Thornhill v. Thornhill* is wrong," but that he gives no reasons whatever. North, J., finishes his judgment, p. 47: "I do not find *Thornhill v. Thornhill* impeached by any decision notwithstanding that in Mr. Jarman's valuable book it is said that it has not been favourably received; and Sir John Romilly always regarded that case as rightly decided."

The line of decisions shews how dangerous it is to allow what one may consider to be common sense to be the final test in the determination of the meaning of a will, alluring as such a course may be and is. The difficulty is that what one Judge considers "common sense"—far removed from its original meaning as that much abused term is—is not even common sense, let alone sense to another. My common sense is like that of Malins, V.-C., and tells me that if a legatee is dead at the date of the making of the will, he is dead at the date of the death of the testator; but it seems that this is not law. And my common sense tells me that when an annuity is left for the maintenance, clothing, and education of A. for the life of B., when A. dies, and no longer can make use of money for maintenance, clothing, or education, the annuity should cease, though B. continue to live. But that is not law either. So my common sense tells me that in the present case Naomi, who was dead at the time of the death of the testator, died "before the final distribution of" the estate. But the law says that this is not so.

I am bound by authority to hold that Naomi's descendants do not share in the fund bequeathed by clause 7.

6. The remaining question is "Do the children of those children of the deceased brothers and sisters take in competition with their uncles and aunts?"

It is perfectly clear law that the word "children" does not include grandchildren.

Radcliffe v. Buckley, 10 Ves. 195; *Moir v. Raesbeck*, 12 Sim. 123; *Pride v. Took*, 3 De G. & J. 252; *Higgins v. Dawson*, [1902] A. C. 1; *Re Williams* (1903), 5 O. L. R. 345; *Re Clark* (1904), 8 O. L. R. 599; *Paradis v. Campbell* (1884), 6 O. R. 632; *Rogers v. Carmichael*, 21 O. R. 658, and *Murray v. McDonald*, 22 O. R. 559.

Unless indeed the circumstances are such that unless it does, it is meaningless.

Berry v. Berry, 3 Giff. 134; *Fenn v. Death*, 23 Beav. 73; *Loring v. Thomas*, 1 Dr. & S. 497; *In re Kirk*, 52 L. T. 346; *In re Smith*, 35 Ch. D. 558, and *Morgan v. Thomas*, 9 Q. B. D., at p. 646, per Jessel, M.R.

There is nothing in law or in philology to prevent grandchildren or even more remote descendants being called "children"—the "children of Israel" are far removed in time and number of generation from their father Israel. But this is done in interpreting wills only, where it is reasonably necessary to give sense or consistency to the will.

In the present instance there is no such necessity. If any brother or sister "die before the final division of the estate," i.e., before the death of the wife (see *Thornhill v. Thornhill*, *ut supra*), "leaving lawful issue," his or her "children" are to take. "Issue" is, of course, generic and covers all the lineal descendants in infinitum, including grandchildren—but the provision is not that the share shall go to such issue, but to the "children" so that such child or children (not "such issue"), shall take the portion to which his or her or their parent would have been entitled if living. And the use of the word "parent" instead of "ancestor," seems to make the interpretation I am giving still more likely—although, of course, "parent" is not uncommonly used of a more remote ancestor than father or mother.

We are able to give every word of the will its primary proper meaning by this interpretation, whereas that claimed for the grandchildren would require a wrench to be given to the meaning of both "children" and "parent."

The grandchildren do not take in competition with the children. The same interpretation, I may add has been

put upon the word "children" in our Statute of Distributions.

Crowther v. Cawthra (1882), 1 O. R. 128, and in policies of insurance, etc., *Murry v. Macdonald* (1892), 20 O. R. 557. There will be judgment accordingly.

Costs of all parties out of the estate; the executors' between solicitor and client.

DIVISIONAL COURT.

MARCH 12TH, 1912.

RE DENTON.

3 O. W. N.

Motion on consent for leave to set down an appeal from above judgment of HON. MR. JUSTICE RIDDELL.

The motion was heard by HON. SIR WM. MULOCK, C.J.Ex.D., HON. MR. JUSTICE CLUTE and HON. MR. JUSTICE SUTHERLAND on the 12th March, 1912.

T. G. Meredith, K.C., for the motion.

THEIR LORDSHIPS granted leave, appeal not to be brought on before 18th March, 1912.

HON. MR. JUSTICE SUTHERLAND. FEBRUARY 13TH, 1912.

BANK OF OTTAWA v. BRADFIELD.

3 O. W. N. 688.

Promissory Notes — Accommodation Endorsement—Endorser Weak Mentally — Inability to Appreciate Transaction — Knowledge of Holders of Notes — Fraud and Undue Influence of Maker of Notes — Counterclaim — Moneys Applied by Bank on Indebtedness of Maker—Evidence.

An action by plaintiffs to recover \$1,425.45, balance claimed to be due plaintiffs on two promissory notes endorsed to them by defendant. Defendant, by his guardian *ad litem* pleaded unsoundness of mind and incapacity for business when notes were endorsed, and counterclaimed for \$5,533, moneys deposited by him in savings bank branch of plaintiffs at Morrisburg, claiming to have been wrongly applied by plaintiffs towards payment of notes of Bradfield & Co.

SUTHERLAND, J., *held*, that plaintiffs action should be dismissed with costs, and defendant to have judgment on his counterclaim to extent of \$3,950.24, with costs, and the counterclaim to extent of \$2,800 to be dismissed without costs.

D. B. MacLennan, K.C., for the plaintiffs.

R. A. Pringle, K.C., for the defendant.

HON. MR. JUSTICE SUTHERLAND:—For some years prior to 1904, one R. H. Bradfield had been the proprietor of a hardware business in the village of Morrisburg, in the province of Ontario, under the firm name of R. H. Bradfield & Company.

On the 23rd August, 1894, by bill of sale he conveyed his goods, chattels, and stock in trade in connection with said business, to his son Herbert Henry Bradfield, and said instrument was duly filed.

R. H. Bradfield also filed a notice of dissolution of partnership, dated 23rd August, 1904, certifying that on that date said partnership of R. H. Bradfield & Company, of which he was sole member, was dissolved, and he had transferred the business and stock to his son. The latter also filed a certificate of partnership, dated 23rd August, 1904, to the effect that he had carried on and intended to carry on the trade and business as hardware merchant in Morrisburg, under the firm name of R. H. Bradfield & Company, and that said partnership had subsisted since the 23rd August, 1904, and he was the only member thereof.

In course of time H. H. Bradfield, who in addition to being engaged in said hardware business had become interested in other companies, got into such financial difficulties that in the year 1910, he was obliged to make an assignment. He was then indebted to the plaintiffs on various accounts to a very large amount. He was owing them in connection with said hardware business, two notes, one dated 6th July, 1910, for \$2,875, payable two months after date, signed by R. H. Bradfield & Company, Ltd., per H. H. Bradfield, payable to the order of R. H. Bradfield, and endorsed by him, and the other dated July, 20th, 1910, for \$2,350, payable one month after date, also made and endorsed in the same way.

In or about the year 1909, apparently H. H. Bradfield had been proceeding to have his sole partnership changed to a joint stock company. It was not shewn at the trial that he had had ever actually obtained letters of incorporation, but he was using the name of R. H. Bradfield & Company, Limited. After the assignment of R. H. Bradfield, his father, the defendant herein, amongst others, filed a claim

against his estate. The history of each of the two notes above referred to appears to be as follows:—

1. A note of R. H. Bradfield & Company, Limited, had been made, dated 25th November, 1909, for \$2,500, payable at three months, to the order of and endorsed by R. H. Bradfield. It was renewed on the 28th February, 1910, for \$2,200. On May 3rd, 1910, the firm's account being overdrawn to the extent of \$643 in the plaintiff's bank, a new or renewal note was made to include said overdrawn account, for the sum of \$2,900. A further renewal for \$2,875 was made on July 6th, 1910, which is one of the notes in question. It is said that when the original note of November 25th 1909, was discounted, the proceeds were placed to the credit of R. H. Bradfield & Company, Limited, to cover an overdrawn account of \$504.43, to purchase a draft for \$1,333.28 in favour of the Ogdenburg Towing & Coal Company, and to pay certain other debts.

2. A note for \$2,400, dated 8th June, 1908, made by said firm and endorsed by H. H. Bradfield, had been renewed from time to time during 1908, and the early part of 1909. On the 29th of July, 1909, it was renewed for the sum of \$2,437.45, and then for the first time endorsed, not only by H. H. Bradfield, but also by R. H. Bradfield. On November 1st, 1909, this note was renewed for three months at \$2,400. On February 4th, 1910, it was again renewed for \$2,412.30, when H. H. Bradfield did not endorse it, but only R. H. Bradfield. This note was then renewed each month for slightly reduced amounts until on July 2nd, 1910, it was finally renewed for \$2,350, in the same form and with only R. H. Bradfield as endorser, and became due and payable on the 20th August, 1910, with interest, amounting in all to \$2,362.80.

On the 27th January, 1911, a writ was issued by the plaintiffs against R. H. Bradfield, the defendant, claiming payment for the total amount then due upon the two notes and amounting to \$5,351.24 on which credit was given for various payments amounting to \$3,925.70, leaving a balance of \$1,425.45.

Particulars of the said credits were demanded on behalf of the defendant and furnished by the plaintiff as follows:

“January 3rd. 1911. Received the sum of \$623.10 from the assignee of the estate of R. H. Bradfield & Co., insolvents, being one-half the dividend payable to the

defendant on his ordinary claim filed against said insolvent estate, paid to the plaintiff, pursuant to defendant's written consent, and applied on note dated July 20th, 1910."

"January 9th, 1911. Retained the sum of \$16.43 being the balance standing to the credit of R. H. Bradfield & Co. in their current account in plaintiff's branch at Morrisburg, and applied on note dated July 20th, 1910.

"January 10th, 1911. Received the sum of \$552.45 from the assignee of the estate of R. H. Bradfield & Co., insolvents, being one-half the dividend payable to the defendant on his preferred claim filed against said insolvent estate, paid to the plaintiff pursuant to defendant's written consent, and applied on note dated July 20th, 1910.

"Retained the sum of \$2,733.81 being the balance standing to the credit of the defendant in the saving department of plaintiff's branch at Morrisburg, and applied on the notes sued on."

After the issue of the writ an application was made to appoint a guardian ad litem of R. H. Bradfield, and one Irwin Hillier was so appointed.

In the statement of defence it is pleaded that if the defendant did at any time endorse the promissory notes referred to in the plaintiff's statement of claim "he was then at the time of unsound mind and incompetent and incapable of making any contract or understanding the nature of what he was doing as the plaintiff well knew."

By way of counterclaim, the defendant claims from the plaintiffs the sum of \$5.533 for money deposited by him in the savings bank branch of the plaintiffs' bank at Morrisburg, and which he alleges to have been wrongly applied by the plaintiffs' bank towards payment of notes of Bradfield & Company.

In this connection the defendant, besides asking repayment of the sum of \$2,733.81 already referred to as a balance standing to his credit in the saving department of the plaintiffs' branch at Morrisburg, and the return of the dividends of \$623.10 and \$552.45 already referred to, all of which had been credited by the plaintiffs on the said notes, alleges that on the 9th day of May, 1908, the plaintiffs withdrew from his said account the sum of \$2,800, and applied it in payment of a promissory note of R. H. Bradfield & Company without the authority of the defendant,

and that at that time he was incompetent to transact business to the knowledge of the plaintiffs.

The plaintiffs' branch at Morrisburg, where the defendant lives, was apparently opened a few days after the 23rd August, 1904, and one Charles B. Graham was appointed local manager. He continued in that position down to about the end of July, 1908, when he was succeeded by G. B. A. Herring, who is the present manager. At no time subsequent to the 23rd August, 1904, was the defendant a partner in the business of R. H. Bradfield & Company. The defendant, as to the two notes in question herein, was merely an endorser for the accommodation of his son, H. H. Bradfield, and received no consideration from the bank in connection therewith. I do not credit the story of the plaintiffs' former local manager, Graham, that he thought the defendant was a partner in said firm. I am satisfied he knew he was not. I have come to the conclusion upon the whole evidence that before the death of his son, George, which apparently occurred in the fall of 1908, the defendant had been failing mentally. and that after his said son's death this condition became more aggravated and apparent.

The evidence as to the mental condition of the defendant is as follows: Dr. Mitchell, superintendent of the Hospital for Insane at Brockville, testified that he had examined the defendant on the 10th of June, 1911, and found him deficient mentally and hazy about past events. He said that he was then suffering from senile dementia, which must have been coming on for from one to five years. He says that he shewed marked deterioration of all the faculties; that his judgment and emotional tone were much impaired; he appeared to be living in a happy state, and was subject to delusions as to his own grandeur. He said he had given away in charity over \$500,000, and had been asked to visit England to receive the honour of Knighthood; he referred to Morrisburg as the richest municipality in the world; he occasionally answered very sanely, but the greater part of his conversation was very erratic; he had delusions, which, in his opinion, were insane delusions. Dr. Mitchell had had no previous acquaintance with the defendant. Dr. P. C. Casselman, a practitioner in Morrisburg for nearly eleven years, testified that the mental condition of the defendant had been deficient back for fully five years and that he would not think him fit to do business during that

time. While he would not say he was unfit to do business five years ago, he would say that he was three years ago; he had seen defendant pretty frequently in the store, but only attended him a few times professionally. The first time he so attended him was in May, 1905, and even at that time he thought he acted peculiarly. He had attended him in March and May, 1909. He considered his condition then much as now. His opinion was that he was effected by senile dementia. He had seen him frequently during the illness of his son, George, in 1908, and even then he did not consider he appreciated what was going on. He says that he felt sure before George's death that the defendant's mental condition was such that it was useless to try and converse with him. He became sure about the time of George's death, which apparently occurred on the 3rd of November, 1908, that the defendant could not appreciate matters in any intelligent way and his professional visits in March and May, 1909, confirmed the view.

Caroline Simmons lived in the defendant's house and knew him intimately for twenty-five years. She said that during the last 5 or 6 years he was failing mentally and is now suffering from an almost complete loss of memory. She says he was possessed of hallucinations and detailed a number of them. She gave the defendant's age as 89.

Mrs. Mary Doran spoke of the defendant as having lost his way in Morrisburg in the fall of 1908.

The Rev. George Anderson, an Anglican clergyman living in Morrisburg, and who had known the defendant for 20 years, said that for 3 or 4 years past he had been weak mentally. He had visited at defendant's house about once a month for two or three years past, and the defendant had talked very strangely. He was possessed of the idea that he had great wealth.

Johnson Dillon, the registrar of the county of Dundas, who had known defendant for many years said that during the last 4 or 5 years he was in a very weak condition, and during the last three years very much as he is to-day. He could not be made to understand business matters. He would speak to him about mortgages he had made when in fact there were no such documents in existence.

Irwin Hilliar, a solicitor and the guardian ad litem of the defendant, said he had known him since 1885; that during the last three or four years he had seen him on an

average of three or four times a week. In his opinion he was incapable of doing business during that time. He had business dealings with him and found that in 1908 and 1909 he could not be made to understand about them. Hilliar was the assignee of R. H. Bradfield & Company, Limited, and when the plaintiffs herein asked for payment of the dividends due against said business in favour of R. H. Bradfield, the defendant, he wished to have the cheques issued in favour of R. H. Bradfield and that they should be endorsed by him to the plaintiffs, but realised that it would be futile to do this. He suggested the getting of an authority from the defendant to do this, but when it was got insisted upon the plaintiffs giving an indemnity to him as assignee in connection with the payments.

For the plaintiffs Dr. Charles J. Hamilton was called and said that he had seen the defendant in July last on purpose to form an opinion as to his mental condition. He says he found him mentally that day particularly bright for a man of his years; that he spoke of various things and seemed to shew a recollection about them; he was favourably impressed with the condition of his mind; would not think it would be proper to say he was far gone in senile dementia as he saw him on that day; he was getting old but was well preserved; he would not say that his mind had deteriorated appreciably from what he saw on that occasion; he thought that he would know a business transaction on that day.

One of the hallucinations which the witnesses called for the defendant spoke of was the notion on his part that he had stock in a tack factory which was very remunerative. According to the evidence he had no such stock. Dr. Hamilton did not have occasion to speak to him about this matter.

William C. Coir, a butcher living in Morrisburg, was called for the plaintiff. He spoke of having dealings with the defendant when the latter was purchasing meat from him, and that he never saw anything wrong with his mind in his dealings with him; that he had no talk with him during the last four or five years except in the way of selling meat to him; he could not say whether he was sane or insane.

Upon the evidence I have come to the conclusion that the defendant had been failing mentally for some years

past and has gradually become incapable of intelligently appreciating business matters. I think it was fairly well established that at all events after the death of his son George in 1908 he was not competent to understand a business transaction. I find that anything he did in the way of signing or endorsing notes or renewals, consents or waivers in connection with the notes in question was done at times when his mental condition was such as that he could not understand or appreciate what he was doing or the liability he was incurring.

It is charged on behalf of the defendant that Graham induced him to sign or endorse the renewal note dated July, 29th, 1909. for \$2,437.45 already referred to and which ultimately became the note for \$2,362.80, dated 20th July, 1910, and in question. At this time H. R. Bradfield was heavily indebted to the bank to the knowledge of Graham. A new manager was coming within a few days to replace Graham in that position. It was suggested in argument that Graham was anxious to put the account of H. H. Bradfield in better shape, if possible, so as to avoid the censure of the bank authorities. H. H. Bradfield says that about July 28th, 1909. Graham came to him and wanted him to get his father's endorsement on the note referred to. He said he told him he would not ask him to do so. He says that Graham said he wanted it in order to save his position. He says that Graham then took the note to his father in the store and came back and said he had signed, that is endorsed it.

H. H. Bradfield's version of the matter is in part corroborated by a witness, Hunter. I credit his story and do not credit Graham's that he did not secure the defendant's endorsement of the said note.

The fact that the note was not then due and yet that Graham thought it necessary to secure a renewal looks curious in itself. Herring, the present manager, of course says it is not an unusual occurrence to secure a renewal in advance.

I am satisfied from the evidence that Graham had had opportunity before this of learning and that he knew that the defendant was not in such a mental condition as to enable him to transact business or realise the liability he was incurring in endorsing the said note.

It is also equally clear, I think, from the evidence, that when the note dated 25th November, 1909, for \$2,500, and which was renewed from time to time until it finally became the note dated 6th July, 1910, for \$2,875, and in question herein, was endorsed by the defendant, he was not then mentally fit to do business or to understand the nature of the transaction. It was his son, H. H. Bradfield, who apparently induced him to endorse this note. I think he did so knowing of his father's incapacity to understand what he was doing, and I think his endorsation of that note and its subsequent renewals down to the one in question herein were obtained by the son from him by fraud and by undue influence, and in each case when he was not competent to transact business or understand the liability he was incurring. The son admits he did not think he was doing right in obtaining such endorsation and that he was committing a fraud on his father. He says he did not think he was committing a fraud on the bank, but considered his father's endorsation all right in so far as it was concerned.

This case, as it seems to me, is similar in principle to *Re James*, 9 Practice Reports 88. That was a case in which an infant "gave to M. a promissory note for the purchase-money of a buggy endorsed by his father, who was of unsound mind and unable to understand what he was doing. The father received no consideration and M. was not aware of his condition." It was decided "that the father's estate was not liable."

In a case of *Weinback's Executor v. First National Bank of Easton*, 21 American Law Register, n.s. 29, the Supreme Court of Pennsylvania decided that "a lunatic who was an accommodation endorser without consideration upon a promissory note, and who has derived no advantage of his endorsation either to himself or his estate, is not liable to a bona fide holder, although the latter had no knowledge of the lunacy."

The plaintiff's action will, therefore, be dismissed.

In the savings bank book of the defendant with the plaintiffs in connection with their branch at Morrisburg, of which a duplicate was put in at the trial, Exhibit No. 5, there appears to be a credit as of date May 31st, 1911, of \$2,774.69, which is one of the credits the plaintiffs assume to give to the defendant on the notes in question. In view of my determination as to the plaintiffs' rights against the

defendant in connection with the notes in question, they had no authority or right to appropriate this balance and apply it on the notes. The defendant will, therefore, be entitled in so far as the notes are concerned to ask for and obtain such balance and be entitled to judgment for that amount against them on his counterclaim with appropriate interest. The defendant will also be entitled on his counterclaim to recover from the plaintiffs the two sums of \$623.10 and \$552.45, obtained by them from the assignee of the R. H. Bradfield Company Limited estate, with interest from the respective times when they received them.

The defendant also in paragraph 7 of his statement of defence and counterclaim asked that a sum of \$2,800 withdrawn by the plaintiffs from the defendant's account without his authority and applied in payment of a promissory note of R. H. Bradfield & Company, on or about the 9th of May, 1908, should be repaid to him.

While I am not at all certain that the defendant was not even then so unfit to transact business as to render it impossible for him with any true appreciation of what he was doing to consent to such a withdrawal of his money to pay the note of another, the evidence is not so clear as to enable me to determine satisfactorily. I think, therefore, that as to this portion of the counterclaim the defendant must fail and the same be dismissed. The plaintiffs' action will be dismissed with costs, and the defendant have judgment for his counterclaim in part as already indicated with costs, and his claim with respect to the \$2,800 dismissed without costs.

COURT OF APPEAL.

MARCH 4TH, 1912.

REX v. JAMES D. CHILMAN.

3 O. W. N. 777.

Criminal Law—Application for Stated Case—Conviction for Receiving Stolen Money — Evidence — Trial Judge's Charge — Criminal Code ss. 1015, 1016.

An application on behalf of the prisoner by way of appeal from the refusal of HON. MR. JUSTICE TEETZEL, the trial Judge, to state a case, and for an order directing him to so state a case for opinion of the Court of Appeal, under the

provisions of secs. 1015 and 1016, of the Criminal Code, raising the questions whether there was evidence upon which the jury might properly find the prisoner guilty on the third count of the indictment (for receiving stolen money); and whether the trial Judge rightly directed the jury in respect of such evidence.

The application to the Court of Appeal was heard by HON. SIR CHAS. MOSS, C.J.O., HON. MR. JUSTICE GARROW, HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MAGEE, and HON. MR. JUSTICE LATCHFORD.

G. Lynch-Staunton, K.C., and C. W. Bell, for the prisoner's application.

H. D. Gamble, K.C., for the Crown, contra.

Their Lordships judgment was delivered by

HON. SIR CHAS MOSS, C.J.O.:—Upon the hearing of the application, both the facts and law were discussed at considerable length. We have since considered the matter and referred to the evidence and the learned Judge's charge, and are of opinion that it would serve no useful purpose to now grant leave to appeal and direct the learned Judge to reserve the questions.

The application is therefore refused.

DIVISIONAL COURT.

FEBRUARY 14TH, 1912.

STAVERT v. CAMPBELL.

3 O. W. N. 716; O. L. R.

Appeal—To Privy Council—Effect of Giving Security for Costs of Appeal—Security not Given as Required by Con. Rule 832 (d) —Stay of Execution—Privy Council Appeals Act, 10 Edw. VII. (Ont.) c. 24, s. 4—Effect of Repeal of R. S. O. (1897) c. 48—Re-enactment with Modification—Interpretation Act, s. 7 (48a).

CLUTE, J., 21 O. W. R. 172; 3 O. W. N. 591, dismissed defendant's motion to set aside a writ of *fi. fa.* issued against defendant. Defendant contended that he having given security for an appeal to the Privy Council it acted as a stay of proceedings.

BRITTON, J., 21 O. W. R. 174; 3 O. W. N. 641, granted leave to appeal to Divisional Court from above order.

DIVISIONAL COURT allowed defendant's appeal and set aside the execution with costs to defendant in any event of the appeal.

An appeal by the defendant from a judgment of HON. MR. JUSTICE CLUTE, 21 O. W. R. 172.

The appeal to Divisional Court was heard by HON. SIR JOHN BOYD, C., HON. MR. JUSTICE LATCHFORD and HON. MR. JUSTICE MIDDLETON.

F. Arnoldi, K.C., for the defendant, appellant.

F. R. Mackelcan, for the plaintiff, respondent.

HON. SIR JOHN BOYD, C.:—The defendants have paid \$2,000 into Court, and the same has been allowed as good and sufficient security on their appeal to the Privy Council, and an order has been made allowing their appeal to that final Court (13th November, 1911).

The practice respecting appeals to the Privy Council is to be found in 10 Edw. VII., ch. 24, and former Acts therein repealed as from 7th March, 1910. Section 4 of that Act declares that upon the perfecting of such security (the security in amount herein given), execution shall be stayed in the original cause unless otherwise ordered. Without special order the plaintiff has undertaken to issue execution, and, upon that process being moved against, Mr. Justice Clute has affirmed its regularity, and an appeal is now (by leave of Mr Justice Britton), taken from his order to the Divisional Court.

Mr. Justice Clute bases his judgment on the terms of Con. Rule 832, declaring that in appeals to the Privy Council, execution shall not be stayed if the judgment appealed from directs the payment of money until security is given for such amount. If this rule is in force, his judgment is right; otherwise, not so. It appears to me that this Rule is not in force by virtue of the recent legislation, but to make this plain needs a good deal of intricate examination of what has been, and how it has been, superseded.

The development of the practice is to be regarded. In R. S. O. 1877, ch. 38, as to appeals to the Privy Council, it was prescribed by sec. 51, that upon the perfecting of security for \$2,000, in respect of costs and damages the execution should be stayed. But the next section, 52, declared that the provisions of the 27th section of the Act as to appeals to the Court of Appeal was to apply to the Privy Council appeals whereby execution was not to be stayed, when the judgment directed the payment of money till further security for that was given. On the revision 10 years later, R. S. O. 1887, ch. 41, a separate Act embodied the legislation as to appeals to the Privy Council, and by sec 3, upon perfecting security to the extent of \$2,000 execution was to

be stayed. By sec. 4 the practice applicable to staying execution on appeals to the Court of Appeal shall apply to appeals to the Privy Council. To ascertain that practice resort had to be made to the Rules passed by the Judges, of which No. 804 contained provision for special security in case of judgments directing the payment of money: *Mc-Master v. Radford*, 16 P. R. 23. The provisions of the statute as to appeals to the Court of Appeal were taken out of the statute and reappear as Rules of Court: see Holmsted and Langton, edition of 1890, p. 670 (see 51 Vict. ch 2, sec. 4).

So the provision as to Privy Council appeals were referred to in the Rules of 1888, and it was provided that security should be for \$2,000, and that any application to the Court of Appeal to stay proceedings shall be made in like manner and be upon the like terms as to security as is provided in like cases upon appeals to the Court of Appeal: Con. Rule 855. It is the union of these two Rules which appear combined as the present Rule 832, and which regulated the practice up to 7th March, 1910. The last case on this point which shews the then practice is *Sharpe v. White*, 20 O. L. R. 575, which was argued in the Divisional Court on 31st January, 1910.

The Rules of 1897 provide that in cases of appeal to the highest Court in Ontario, security need not be given (apart from special application) for the amount directed to be paid by the judgment in order to secure a stay of execution: Rule 827; and Rule 832 varies that policy as to an appeal to the highest Court of the Empire.

That was the state of the law under R. S. O. 1897, ch. 48, secs, 2, 3, and 4. Section 4 reads: "Subject to Rules to be made by the Judges under the Judicature Act the practice applicable to staying execution upon appeal to the Court of Appeal in force prior to 16th April, 1895, shall apply to an appeal to Her Majesty in the Privy Council." (See 62 Vict., ch. 2, sec. 1). This was an expansion of what is found in R. S. O. 1887, ch. 41, sec. 4, which is quoted as its original.

A note as to chronology; R. S. O. ch. 48 (1897), referring to Rules to be made by the Judges, was prepared in draft soon after, if not before 13th April, 1897, the date of passing the Act, 60 Vict., ch. 3, giving effect to the revised statutes 1897, which were to be completed at an early date (see preamble). This body of revised statutes was by proc-

lamation declared to come into effect on 31st December, 1897 (see R. S. O. 1897, p. xxi.). The Rules referred to in sec. 4 of ch. 48, were made by the Judges under 58 Vict., ch. 13, sec. 42, and were approved and to go into effect on 1st September, 1897 (see Rule 1 and title page of Con. Rules, 1897), and were completed on 23rd July, 1897 (see *ib.*, p. x.).

Prior to the making of these Rules, the practice as to these appeals was under the Con. Rules of 1888, which were in force on 16th April, 1895, but were superseded by the new body of Rules consolidated as of 1897. No such action as to the making of Rules has taken place under, or in contemplation of the passing of the Act, 10 Edw. VII., ch. 24.

As I have said, this statute of 1897 is repealed, and the section now in force when this security was given, reads: "Subject to Rules to be made by the Judges of the Supreme Court, the practice applicable to staying executions upon appeals to the Court of Appeal shall apply to an appeal to His Majesty in his Privy Council." That is to say, by the express enactment now in force the practice applicable to staying executions in appeals to the Court of Appeal shall apply to appeals to the Privy Council—which is, that no security for the amount directed to be paid by the judgments is required—subject to Rules (*i.e.*, of a contrary effect), to be made by the Judges. None such have been made; the Act contemplates and provides for future Rules "to be made," and one must find some declaration of practice in such Rules contrary to and equally explicit with the statutory declaration that execution shall be stayed when security for the \$2,000 has been given. This is a new statute which in my opinion cannot be varied in its meaning by omitting some of the words and reading "to be made," as if synonymous with "already made."

For this reason I cannot agree with the order of my brother Clute, which should, I think, be set aside, with costs in any event to the defendants.

HON. MR. JUSTICE LATCHFORD:—I agree in the result.

HON. MR. JUSTICE MIDDLETON:—When the Court of Error and Appeal was established the statute (12 Vict., ch. 63), contained provisions relating to appeals to Her Majesty in her Privy Council, and sec. 46 provided that upon giving

security for the costs of appeal, and that "upon the perfecting of such security execution shall be stayed in the original cause; provided always that the provisions of the first, second, third, fourth, and fifth provisos in the 40th clause of this Act contained shall be in force and apply to the appeal hereby granted, and the completion of the security hereby required shall not have the effect of staying execution in the original cause in the different cases accepted out of the said 40th clause, unless the provisions in the said provisos contained shall have been complied with."

Section 40 relates to the stay of execution on an appeal to the court of Error and Appeal. The first of the provisos is that the perfecting of security for the future costs shall not operate as a stay of execution unless additional security is given for the amount ordered to be paid. The practice upon the appeal to the Privy Council remained upon this footing until after the Judicature Act.

In the revision of 1877, the statute had been changed in form but not in substance. The general provision for a stay of execution upon giving security for costs was placed in a separate section, 51, and the proviso requiring security for the debt when money was ordered to be paid was embodied in sec. 52.

In 1887 the language of the statute was changed. By R. S. O., ch. 41, sec. 3, the general provision that "upon the perfecting of such security" (i.e., the security for the costs of the appeal) "execution in the original cause shall be stayed," was continued. Section 4 provided: "The practice applicable to staying execution upon appeals to the Court of Appeal shall apply to an appeal to Her Majesty in Her Privy Council." It was assumed in general practice that this made no change in the law, and that sec. 4 had the effect of retaining the old proviso as an exception to the general words of sec. 3. The proviso itself was removed from the statute, and became Con. Rule 804 of the revision of 1888.

In 1895 the experiment was tried of providing for one appeal and one appeal only and giving the dissatisfied litigant the right to go either to the Divisional Court or the Court of Appeal, and as part of the scheme all security on an appeal to the Court of Appeal was abolished" (58 Vict., ch. 12, sec. 77), unless specially ordered.

This system was found to be unsatisfactory; and in the revision of 1897, provision was made for security for costs

on all appeals to the Court of Appeal, but on this being given execution for a money demand is stayed (Con. Rule 827).

By the statute relating to Privy Council appeals, R. S. O. 1897, ch. 48, sec. 3, remains unchanged, and sec. 4 assumes this form: "Subject to Rules to be made by the Judges authorized to make Rules with reference to the High Court and the Court of Appeal under the Judicature Act, the practice applicable to stay execution upon appeals to the Court of Appeal in force prior to 16th April, 1895, shall apply to an appeal to Her Majesty in Her Privy Council." This statute came into effect on the 31st December, 1897. The 16th April, 1895, was the date when 58 Vict., ch. 12, came into force.

The Con. Rules of 1897 were not Rules made by the Judges, but were Rules framed by a special commission appointed under 58 Vict., ch. 13, sec. 42; and by 59 Vict., ch. 18, sec. 15, these Rules are given statutory effect.

These Con. Rules came into effect on 1st September, 1897, four months before the Revised Statutes. In them a separate provision was made with reference to Privy Council appeals, and the Court of Appeal practice before 1895 was continued in Con. Rule 832 as applicable to Privy Council appeals, so that there was no conflict between the statute and the Rules and the words "practice applicable to staying execution," received a statutory interpretation by Con. Rule 832.

No Rules were ever made by the Judges under the statute.

By the statute of 1910 (10 Edw. VII., ch. 24), a change is made. Section 3 is modified. Execution is, upon perfecting of security, to be stayed, "unless otherwise ordered." Section 4 is also changed, it becomes (as sec. 5): "Subject to Rules to be made by the Judges of the Supreme Court, the practice applicable to staying executions upon appeals to the Court of Appeal shall apply to an appeal to His Majesty in His Privy Council." The Judges having made no rules, this statute is a clear provision that the present practice relating to the stay of execution on an appeal to the Privy Council shall govern, and not the old practice prior to 1895, referred to in the revision of 1897, and embalmed in Con. Rule 832.

It may be that the Judges have no power to cut down or modify the general provision that subject to such order as in the particular case may be deemed just execution is to be stayed, and that no such general provision as Con. Rule 832 (d) would be valid. We are not now called on to interpret the expression "practice applicable to staying executions" as found in the Act of 1910. It may be found that it falls short of making Con. Rule 827 apply to Privy Council appeals.

The appeals should be allowed and the execution should be set aside with costs to the defendant in any event of the appeal.

HON. MR. JUSTICE CLUTE.

MARCH 15TH, 1912.

MAGNUSSEN v. L'ABBE AND BENGSTEN.

3 O. W. N.

Negligence—Workman Injured—While Working in Trench—Struck on Head by Pole Falling into Trench—Evidence—Not Satisfactory—New Trial—Costs.

Plaintiff, a labourer, 27 years of age, working for defendants, contractors, engaged in construction of a trench or ditch in Port Arthur, was injured while in the bottom of the trench shovelling earth off the rock, when he was struck on the head by a pole falling into the trench, which produced concussion of the brain, broke the drum of one ear, injured his eyes causing him to see double, and left him in a state of general shock. The injuries were alleged to have been caused by negligence of defendants. Plaintiff claimed \$5,000 damages.

BOYD, C., at trial, dismissed the action without costs.

DIVISIONAL COURT, 20 O. W. R. 502; 3 O. W. N. 301, set aside above judgment and ordered a new trial on the ground that the evidence shewed that plaintiff was where he ought to have been and where he had been so ordered by defendants' foreman, and the defendants had failed to discharge the onus cast upon them of shewing that the accident occurred through no fault of theirs.

CLUTE, J., at new trial, found the defendants guilty of negligence in not taking proper precautions to shore up the sides of the trench or to adopt some other means to prevent the cave-in. Plaintiff's damages assessed at \$1,100. Judgment accordingly, with costs of action of former trial and appeal to Divisional Court.

Retrial of an action to recover \$5,000 damages for injuries alleged to have been caused by the negligence of the defendants.

The retrial was heard by HON. MR. JUSTICE CLUTE, at Port Arthur, March 7th, 1912.

A. E. Cole, for the plaintiff.

A. J. McComber, for the defendant.

HON. MR. JUSTICE CLUTE:—This action was tried at Port Arthur, on the 28th June, 1911, before the Chancellor and a jury. No questions were submitted, but the jury found as follows: "We believe the plaintiff was injured by accident, through no fault of his own or the defendants. The man Polson evidently started the log moving. Whether accidentally or not we are not prepared to say." Upon this finding the Chancellor dismissed the action, and a new trial was ordered by the Divisional Court to be had without a jury. The parties agreed that the evidence in the former action should be read with such further evidence as either party might be advised to produce.

A number of witnesses were examined on the retrial, including Alfred Polson, referred to in the jury's finding.

To understand the effect of the evidence of Polson it will be convenient here to state the nature of the action and the evidence at the former trial.

The defendants were contractors. The plaintiff was in their employ. A trench was being dug for the city, from which there led a cross-trench. The plaintiff was working in the cross-trench. At the point of the intersection there was a manhole some 12 or 15 feet deep. The cross-trench was from 10 to 12 feet deep at the manhole, and of a lessor depth as it extended from the manhole.

The sides of the upper portion of the trench were earth, sand, small stones, and hard-pan. There was further blasting to be done in the trench at a distance of some 20 feet from the manhole. A number of blasts had already been put in. The plaintiff was in the cross-trench, about 8 feet from the manhole, throwing out earth, broken rock, and stone. Polson was in charge of the blasting. He had several men with him assisting. It was a part of his duty, before the shots were fired, to cover the holes with logs to prevent the escape of rock and other debris thrown out by the blast. The defendant, Bengsten, had general charge and supervision of the work. He had authorized Polson to call to his assistance the men digging in the trench for any purpose that he might require them in connection with his blasting and particularly in removing the logs to be placed over the drill holes. After a previous blast the logs had been placed on the edge of the trench. The nearest log, I find from the evidence to have been placed at from 2 to 2½ feet from the edge of the trench. The evidence differs as to the size

of this log. It is spoken of as a telegraph pole. It was large at one end and smaller at the other. The largest end was near the manhole. Polson was standing near that end. The men assisting him were nearby, ready to give a hand. He held a cant-hook in his hand. He required further help to move the log, and called the plaintiff, who was working beneath in the trench, to his assistance. As the plaintiff looked in answer to him calling, he saw the earth and timber falling, and received a blow from the falling log, which caused the injuries complained of. It was disputed at the former trial as to what had taken place, causing the log to fall in.

Polson was not present at the former trial, not living in the district at that time. Plaintiff's witnesses being the men who were assisting Polson, swore that the bank caved in, causing the pole to roll in at one end where the bank gave way. The defendant Bengsten, swore that he was about 100 feet away, but could see what took place, and declared that Polson, with the cant-hook, started the log rolling, that the bank did not cave in, but that Polson rolled the log in.

The new trial was granted mainly to get this further evidence. I may say here that the Chancellor in his charge to the jury gave credit to the plaintiff and his witnesses. He says: "These men impressed me favourably. They just stated simply what they knew. What they did not know they did not try to tell. They tried to tell you the truth of what they remembered."

In reading the evidence one is impressed with this same view, and that is the opinion I formed of Polson. In his evidence before me he stated that he called to the plaintiff, and while he was waiting for him to come out of the trench the earth caved in and that he, Polson, went with it, and went down feet first. He swears positively that he did nothing with the cant-hook. I am satisfied from the evidence of Polson, and the plaintiff's other witnesses that this is the manner in which the accident occurred, and that the defendant is mistaken in his statement of how it occurred.

The cave-in as described by some of the witnesses extended back some $2\frac{1}{2}$ feet, sufficient to start the log moving, and extended down the sides 4 or 5 feet. This corresponds exactly with what had occurred with a previous cave-in at the manhole, of which the defendant Bengsten was aware prior to the accident in question.

There was also evidence that the effect of the blasting was to loosen the soil about the trench and render it liable to fall in, and that the trench was dangerous without being shored-up or protected. The defendant Bengsten had knowledge of all that occurred, that is of the condition of the trench, of the previous cave-in, of the position of the log on the edge of the trench, and ought to have known, I think, of the danger men incurred in working in the trench.

I find the defendants guilty of negligence in not taking proper precautions in shoring-up the sides of the trench or adopting other means to prevent the cave-in.

I am further of opinion that if the defendant Bengsten's evidence of the cause of the falling in of the log be accepted, that is that it was owing to Polson rolling it over with the cant-hook, the defendants are still liable.

It was admitted by the defendant Bengsten before me that Polson had charge of the blasting and charge over the men whose duty it was to place the logs and prevent the discharged blast from flying out through the trench. He was, therefore a man having superintendence, and while in the act of such superintendence he negligently and carelessly rolled the log into the trench knowing the plaintiff was there. The plaintiff at that moment was under his control, and was just in the act of obeying his command, but that would not make any difference. If he, as superintendent, under sec. 3, sub-sec. 2, was guilty of negligence, which caused injury to a man even in another department, the defendants would still be liable. In *Kearney v. Nicholls*, 76 L. T. 63, it was held, "that it is not necessary that such superintendence should be exercised directly over the workman injured, or that the workman should be acting under the immediate orders of such superintendent; it is enough if the superintendent and the workman are both employed in furtherance of the common object of the employer, though each may be occupied in distinct departments of that common object."

Section 2, sub-sec. 1, does not limit the scope of sec. 3, sub-sec. 2, but enlarges the scope of the application of the Act as limited by sec. 8 of the English Act. This is apparent on comparing the two Acts.

I place, however, my decision upon the first ground.

The amount of damages that ought to be given is difficult to ascertain. The injuries suffered were: (1) the drum of the ear was broken, which seriously affects the hearing

through that ear; (2) the injury to the eye causes the plaintiff to see double. The specialist states that it is impossible to say whether this injury is permanent or not, but he is strongly of the view that it is a permanent injury. It is not one that can be corrected by glasses.

The plaintiff is a young man, 27 years of age, otherwise in good health, and was capable of earning \$3.50 a day. He was a driller, and required, therefore, his natural sight to see the drill. In attempting subsequently to drill he had to cover the one eye, otherwise he would make a mis-stroke. He tried the method of wearing a handkerchief over one eye, and not with very satisfactory results. He is still far from well, suffering severe pains in his head; not capable of hard and continuous work. There can be no doubt that his earning power has been seriously depreciated and probably will be during his life. The evidence is uncertain as to the extent of the loss. After taking all the circumstances into consideration, I think \$1,100 is a reasonable sum to assess as damages, and I assess such sum accordingly.

The plaintiff is entitled to the costs of the action, including the former trial, the appeal to the Divisional Court, and the second trial.

COURT OF APPEAL.

FEBRUARY 22ND, 1912,

RE RISPIN.

3 O. W. N. 706; O. L. R.

Will — Construction — Death of Beneficiary — Application for Directions — Payment into Court for Benefit of Next of Kin—Reference Directed.

The testator died in September, 1895; the son received various payments from the executor and died in November, 1910, leaving a will in which he assumed to dispose of the estate in the hands of the executor, amounting to about \$15,000. The executor disclaimed all interest beneficially and asked to whom the fund should be paid, 1st, under the will of the son, or 2nd, to the next of kin of the testator as an undisposed of residue.

BOYD, C., *held*, 19 O. W. R. 269; 2 O. W. N. 1122, that the undisposed of residue in the hands of the executor should be paid into Court for the benefit of the next of kin of the testator, and that it be referred to the Master at London to ascertain who they are and to distribute the fund accordingly. The executor to pass his accounts and receive his costs and commission and be discharged. Costs of the application out of the estate. The solicitor appointed to represent the unascertained next of kin to have the carriage of the matter in the Master's office.

COURT OF APPEAL dismissed appeal by the Canada Trust Co. All costs out of estate.

An appeal by the Canada Trust Company, executors of the estate of Luke Rispin, from an order of HON. SIR JOHN BOYD, C., 19 O. W. R. 269, upon a motion for the construction of the will of the late Richard Rispin.

Richard Rispin, a market-gardener, of the city of London, Ontario, died on 20th of September, 1895, having made his will on June 10th, 1893, whereby he appointed the defendant Davis to be his executor. His only near relations at the time of his death were his son Luke Rispin and a grandson, Charles Rowe, who had not been heard from for some years.

By the will the testator's real estate and his goods, chattels and live stock were devised and bequeathed to his son Luke Rispin. Then followed the bequest which gives cause for this application, which is as follows:—

“4. After the payment of all my debts and funeral expenses I give the rest of my cash and securities in bank or in my possession in trust to my executor the Reverend Evans Davis, and I authorize and request him to pay the interest in whole or in part to my son Luke Rispin and the principal in whole or in part to my son Luke Rispin, as in the judgment of my executor may be prudent with reference to the habits and conduct of my son, my will and intention being that it shall be wholly in the discretion of my said executor to pay the interest and principal in such amounts and at such times as he may think right or to withhold the payment altogether, and I appoint the said Reverend Evans Davis to be executor of this my will. In testimony whereof I have hereunto set my hand this tenth day of July, 1893.”

Luke Rispin died on November 2nd, 1910, having also made his will, whereby he appointed the plaintiffs to be his executors.

The defendant received the bequest and out of it paid certain sums, the amounts of which were of no consequence to Luke Rispin in his lifetime, but at his death a considerable sum, some \$14,600, remained, and the question was as to the proper disposition of this sum.

The learned Chancellor was of the opinion that under the bequest Luke Rispin took nothing, but what the defendant as trustee chose to give, and that consequently as to

what remained at Luke Rispin's death there was an intestacy on the part of Richard Rispin.

The appeal to the Court of Appeal was heard by HON. SIR CHARLES MOSS, C.J.O., HON. MR. JUSTICE GARROW, HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MEREDITH, and HON. MR. JUSTICE MAGEE.

C. A. Moss, for the Canada Trust Co., appellants.

F. P. Betts, K.C., for the defendant Davis, executor of Richard Rispin.

W. R. Meredith, for the Official Guardian.

HON. SIR CHARLES MOSS, C.J.O.:—The question submitted for solution in this appeal is whether upon the true construction of the 4th clause of the will of the late Richard Rispin the cash and securities therein designated were so disposed of as that upon the testator's death they became the property of his son Luke Rispin, to which his personal-representatives are now entitled, or whether as determined by the learned Chancellor they are now subject to distribution among the next of kin of the testator as upon intestacy.

There is no direct gift to Luke Rispin of the property in question or any part of it. In terms it is given to the executor, in trust, it is true, but not expressly to hold for Luke Rispin. If in the testamentary disposition in question a gift to Luke Rispin is to be found it is only to be gathered from the whole clause. It contains words indicative perhaps of an idea in the mind of the testator that his son's position was to be as owner, with his right of complete enjoyment of it or its fruits controlled by the exercise of the prudent and discreet judgment of the executor to be interposed if and when necessity required. The use by the testator of the expressions "pay" and "payment" contained in the authority and request to the trustee, which in the primary sense imply an antecedent obligation instead of the word "give," which implies voluntary action, may be said to afford some indication of an intention that the property though held by the trustee was beneficially the property of the son.

But in view of the other language it is scarcely to be supposed that the testator was intending to use these words

in their strictest sense, but simply as terms convenient to express the transfer of money. They are not the controlling words of the clause. Greater force is found in the injunctions laid upon the trustee and the declaration of the testator's will and intention that it was to be wholly in the discretion of the trustee to pay or withhold payment altogether of principal or interest.

The property was thus left wholly subject to the trustee's action, and whether Luke Rispin got any or all of it depended wholly upon the trustee. It is plain that the testator was very desirous of withholding from his son any control over the property and any right to demand or receive it or any part of it from the trustee except with his consent.

It was placed beyond the son's power to make any disposition of it which would take effect either during his lifetime or after his death. To have left it otherwise would have frustrated his main design, by enabling it to be assigned or pledged, and the proceeds improperly spent.

The matter being entirely within the power and discretion of the trustee as regards what Luke Rispin should receive, only that which he received up to the time of his death became his or belonged to him. The remainder being undisposed of in the hands of the trustee, who, of course, lays no claim to it on his own behalf, is therefore subject to distribution as upon intestacy.

There appears to be no question as to the date of the intestacy being as of the date of the testator's death.

There does not appear to be any good ground for further enquiry as to the oral directions said to have been given by the trustee to the manager of the loan company. The fact remains that the property never was received by or placed in the control of Luke Rispin, but continued in the possession and subject to the actions of the trustee.

The appeal fails and must be dismissed, but under the circumstances the costs of all parties may be properly borne by the estate—the trustee's costs as usual.

HON. MR. JUSTICE GARROW:—I agree with the conclusion of the learned Chancellor, and would have been content to simply assent without more, but for the earnestness with which the case for the appellant was presented to us by coun-

sel, and the number of cases which were cited in support of his contention.

The question is, of course, simply one of construction, and therefore depends upon a proper consideration of the exact language used.

The testator's good intention towards his son, although apparent, is not alone sufficient. There must be found in the language either an express, or at least an implied gift of the property in question, otherwise there is no will as to it, and it must pass as the law directs in the case of intestacy.

The cases bearing upon similar questions arising under other wills are numerous, and one might even say sometimes embarrassing, if not conflicting. Several of them are referred to by the learned Chancellor. But no case is after all particularly useful unless as seldom happens it arose upon similar language and under similar circumstances, or has laid down some general principle of construction applicable to all such questions.

Instances of the former class are *In re Stanger*, *Morison v. Tate*, 60 L. J. N. S. Ch. 326, and *Bain v. Mearns*, 25 Grant 450.

And of the latter, I refer to *Lassence v. Tierney*, 1 MacN. & G. 551, where Lord Cottenham said: "If a testator leaves a legacy absolutely as regards his estate, but restricts the legatee's mode of enjoyment of it to secure certain objects for the benefit of the legatee—upon failure of such objects the absolute gift prevails; but if there be no absolute gift as between the legatee and the estate, but particular modes of enjoyment are prescribed and these modes of enjoyment fail, the legacy forms part of the testator's estate, as not having in such event been given away from it . . . In every case, therefore, the question must be one of construction, and except for the purpose of such construction very little assistance can be derived from former decisions. It is, however, obvious that the intention that the gift shall be absolute, as between the legatee and the estate, is in all cases of construction to be collected from the whole of the will, and not from there being words which standing alone would constitute an absolute gift."

In *In re Johnston* (1894), 3 Ch. 204, referred to in the judgment of the learned Chancellor, there were what was

held to be gifts to the sons which makes all the difference, for if once the conclusion is arrived at that there is a gift, the Court will enforce the trust.

The circumstance that here the property is expressly given to the defendant "in trust" is not, I think, of controlling importance, having regard to the whole language of the bequest, which must, of course, be looked at.

In *Eaton v. Watts*, L.R. 4 Eq. 151, the testatrix had given her property to her husband "hoping that he will leave it after his death to my son . . . if he is worthy of it" . . . The testatrix then explained her reasons for leaving the property in the entire power of her husband, namely, that the son was already certain of a handsome fortune independent of his father, and that she could not then feel certain what sort of character he might become, and therefore left it to the husband, "in whose honour, justice and paternal affection, I have the fullest confidence." She then provided for the case, which actually occurred, of the son predeceasing the father, by repeating that she left the property to her dear husband "to dispose of it as he thinks fit, yet should my son have any children, I do not doubt it will go to them from him, knowing his steady principles and clear judgment of right and wrong and his sense of justice." V.-C. Stuart held that no trust was created in favour of the son, saying: "The words of confidence are weaker than in most cases, while the expressions giving control to the object of the gift are extremely strong, so strong that in my opinion they bring this case within the observation of Lord Alvanley, that the subject of the gift was placed so completely in the power of the object of the gift as that the testator left to him the option to defeat the wish or hope expressed."

The reference to Lord Alvanley's observation is to his judgment in *Martin v. Keighley*, 2 Ves. 355, where he says that "wherever any person gives property and points out the object, the property, and the way in which it shall go, that creates a trust, unless he shews clearly that his desire expressed is to be controlled by the party, and that he shall have an option to defeat it.

See also *Knight v. Boughton*, 11 Cl. & F. 513.

These are, it is true, instances of precatory trusts, but a precatory trust once established is just like any other trust,

and in the process of establishing such a trust, it is, I think, quite permissible to look at what prerequisites the authoritative cases have determined must exist. And one of the prerequisites is that the existence of an option in the trustee will usually be fatal to the trust. See further per Lord Truro in *Briggs v. Penny*, 3 MacN. & G. 546.

And for an instructive discussion by Romer, J., of the circumstances under which a power to appoint will be held to create a trust in favour of a class; see *In re Weeks Settlement* (1897), 1 Ch. 289. There the alleged trust failed because although the testator's good intention was, as here, apparent, no gift had actually been made. And I may note that there was in that case the circumstance, so much relied on here, of no gift over, a circumstance always of importance if the language of the testator can be said to be doubtful, which cannot I think be said in this case.

For these reasons, as well as for those given by the learned Chancellor, I am of the opinion that his judgment should be affirmed and the appeal dismissed.

The intestacy, it is not disputed, as I understood counsel, is to be as of the date of the death of Richard Rispin.

The costs of all parties may, I think, come out of the fund.

HON. MR. JUSTICE MEREDITH:—I agree with the learned Chancellor in his conclusion and in his reasoning.

If the gift in question were made inter vivos it would hardly be contended that that part of the fund which remained at the death of the son would not be, beneficially, the property of the surviving father; and I can find nothing in the mere fact that the gift was by will, nor anything in the will itself, to alter the case. There is certainly nothing in the grammatical construction of the words in question which warrants, or supports, the contention that the whole fund passed to the son, with only a restraint upon his control over it during his lifetime. The word "withhold" in no sense implies any right in the son which might be withdrawn from him; on the contrary, it indicates an absence of any right in him, except to that which was not withheld—that which was paid to him; whilst the other bequests of the will—one to the son himself—shew plainly the character of the language the testator would have used if he had meant that which the appellants here contend for.

The leaning against an intestacy has no great weight in such a case as this, in view of the character of the statutory distribution of the estates of intestate persons in this province, the statutory will as it is sometimes called: the residue would go to the testator's children share and share alike.

Decisions in other cases are not very helpful in such a case as this: and no two cases are quite alike. We are not confronted, in this case, with the great difficulty which was involved in the case of *Gude v. Worthington*. That case cannot rule this case, much less can all that might be thought to flow logically from the decision in it. A great difficulty that would be met if, in this case, the appellants' contention were given effect to, is this, the very purpose of the father to prevent the son wasting any part of the testator's estate in dissipation or improvidence would be frustrated: if the son took a vested interest in the whole fund under the will, whatever might have been his exact right as to possession of it, his powers of disposition over it would have been enough to frustrate his father's provident attempt to save it.

The additional evidence, sought to be adduced here, would not alter the case, even if taken most favourably for the appellants: there would be no payment, within the meaning of the will, beyond the sums actually received by the son.

I would dismiss the appeal.

HON. MR. JUSTICE MAGEE:—I agree that the judgment appealed from should be affirmed and for the reasons given. It is not necessary to consider what would have been the rights of the testator's son Luke Rispin in case there were any withholding by the executor in bad faith without having any reason in his own mind for doubting the propriety of paying the fund over on account of what the testator called "the habits and conduct of my son." No such case is made here and in the absence of such bad faith it is clear that the son could not in his lifetime have compelled the payment over to him of any part of the fund. That being so it seems to follow that the present case turns on whether the executor could after the death of Luke Rispin have exercised the discretion in his favour. It is not a trust for Luke Rispin and his executors with power to

withhold during Luke Rispin's life on account of his habits, but the executors would only take because there was an absolute interest given to Luke Rispin, or because a life interest was given him which at law would imply the absolute interest. But he took neither. There was a power to give him the fund held in trust for some person or persons. As was said in *Duke of Marlborough v. Lord Godolphin*, 2 Ves. Sen. 61, "it would be absurd that powers of this kind should be executed for benefit of a person dead at the time of executing." If, then, the executor could not now exercise his discretion he has not waived or refused to exercise it by submitting the matter to the Court.

MASTER IN CHAMBERS.

MARCH 16TH, 1912.

MITCHELL v. HEINTZMAN.

3 O. W. N.

Pleading—Negligence Action—Motion to Strike out Part of Statement of Claim—Motion for Particulars of Alleged Negligence before Pleading—Automobile Accident.

MASTER-IN-CHAMBERS held, that *Lum Yet v. Hugill*, 20 O. W. R. 877, governed this case.

An action to recover damages for injuries inflicted by defendant's automobile. The defendant moved to strike out paragraphs of the statement of claim. At the hearing, he also asked for particulars of injuries and of damages.

T. N. Phelan, for the defendant's motion.

J. P. MacGregor, for the plaintiff, contra.

CARTWRIGHT, K.C., MASTER:—The paragraphs attacked set out a good deal that may be evidence at the trial in reply to a statement of defence. At present they do not seem to be material.

The similar case of *Lum Yet v. Hugill*, 20 O. W. R. 877, shews all that is necessary in a statement of claim in this action.

The best order now to make will be to give plaintiff leave to deliver an amended statement of claim omitting the paragraphs attacked and giving particulars of injuries and of special damages alleged in the 9th paragraph. This can be done in a week or such longer time as plaintiff requires and the statement of defence can be delivered in the usual time.

Any defence set up can be answered in the reply. Costs may be in the cause.

MASTER IN CHAMBERS.

MARCH 16TH, 1912.

HARRISON v. KNOWLES.

3 O. W. N.

*Venue — Change — Toronto to London—Witnesses—Jury Notice—
Convenience—Motion Dismissed—Costs in Cause.*

Motion by the defendants to change venue from Toronto to London. The facts of this case sufficiently appear in 21 O. W. R. 245.

S. G. Crowell, for the motion.

O. H. King, contra.

CARTWRIGHT, K.C., MASTER:—The defendant says that he and "T. M. Knowles, and some three or four experts, all from the city of London," will be required at the trial. He also relies on the fact that the machine in question is at London. This is answered by a very full affidavit of the plaintiff's solicitor, who has carefully complied with the provisions of Rule 518. He says that the plaintiff and some one from his office will have to come from New York, and apparently one or two experts. But two experts will be also called resident in Toronto, and one on a question about a rubber blanket, being considered a necessary part of the machine in question.

He further says that the fact of the machine being in London is of no importance now, seeing that it has been in use for nearly two years. The shipping bill of the machine and rollers is dated 10th June, 1910. This he says is confirmed by the fact that defendants have made payments on account on seven different occasions since receiving the machine. There is at present a jury notice, which was served by the defendants, who are counterclaiming for damages for the alleged inefficiency of the machine. If this stands there cannot be a trial either here or at London until next September. Perhaps on an application to strike out the jury notice it may be thought right to do so unless defendant will accept plaintiff's offer to have the case set down now and tried at the current jury sittings here.

Another plan would be to strike out the Jury notice and have the case tried here or at London non-jury sittings at the end of April.

However that may be, at present I do not think any case is made out for the change of venue and the motion will be dismissed with costs in the cause.

COURT OF APPEAL.

HON. SIR CHAS. MOSS, C.J.O.

FEBRUARY 19TH, 1912.

RE STURMER AND BEAVERTON.

3 O. W. N. 715; O. L. R.

*Costs—Local Option By-law—Application to Quash Unsuccessful—
Real Applicant Liable to Village for Costs—Appeal to Court of
Appeal—Leave Refused.*

On a summary application to quash a local option by-law, made in the name of a man of straw, put forward by the real actors, two hotel-keepers, Alexander Hamilton and Thomas Overend, MIDDLETON, J., 19 O. W. R. 156, stayed the proceedings until they should give security for costs, in addition to the security required by the Municipal Act (1903), s. 378, s.-s. 4, 5, 6, or consent to be added as applicants, *holding* that the Court has inherent jurisdiction to prevent abuse of its process, and as a part of that jurisdiction will stay proceedings as being taken against good faith when a man of straw is put forward by those really litigating, until they either give adequate security or consent to be added as parties so that an order for costs may be made against them in the event of failure.

That this jurisdiction may be exercised as well in the case of a summary application to the Court as in an action.

That the statutory requirement of security to a certain sum in any case does not take away the right of the Court to require those invoking its aid to come personally before it and assume full responsibility for their actions or to supply such security as will be adequate to meet the respondent's costs.

The required security was given. At the hearing of the application, MIDDLETON, J., 19 O. W. R. 255, dismissed the application to quash the by-law, and the DIVISIONAL COURT, 19 O. W. R. 430, dismissed an appeal therefrom.

The security for costs having been found inadequate to satisfy the taxed costs of the municipality, an order was made by BOYD, C., 20 O. W. R. 560; 25 O. L. R. 190, requiring and directing Hamilton and Overend to pay to the village the sum of \$384.14 with interest to date of payment, being unpaid balance of costs taxed and allowed to the village on an application to quash local option by-law and appeals, on the ground that these men were the real applicants, acting behind a man of straw, and they should pay the costs, *holding* that under Ont. Jud. Act, s. 119, the Court has full power to determine by whom and to what extent costs are to be paid; and, in the exercise of its inherent power and equitable jurisdiction, will make a person who has set the Court in motion pay the costs of his unsuccessful application, though he be not formally a party.

In re Appleton, [1905] 1 Ch. 749, and *Burford v. Lenthall*, 2 Atk. 553, followed.

DIVISIONAL COURT, 21 O. W. R. 55; 3 O. W. N. 613, affirmed judgment of Boyd, C.

Moss, C.J.O., refused leave to appeal to Court of Appeal, *holding* that it is plain that objections founded on technical reasons are no longer permitted to prevent the Court from dealing, so far as costs are concerned, with one who has so intervened as to make himself the substantial though not the ostensible party, and the above decisions did not appear to introduce any novel rule of practice.

An application on behalf of Alexander Hamilton, for leave to appeal to the Court of Appeal from an order of a

Divisional Court, 21 O. W. R. 55, affirming an order of Hon. Sir JOHN BOYD, C., 20 O. W. R. 560, 25 O. L. R. 190.

F. Morison, for the applicant.

W. E. Raney, K.C., for the municipality.

HON. SIR CHAS MOSS, C.J.O.:—The actual amount involved in the proposed appeal is \$384, which is said to be the excess of the taxed costs of opposing the original application beyond \$300 paid into Court as security.

The special grounds urged in support of a further appeal are that Hamilton not having been a party to the original proceedings the Court had no jurisdiction to compel him to pay any of the costs incurred in the matter, and that neither by the practice as it existed before the Judicature Act nor by virtue of the power as to costs conferred by that Act, have the Courts power or jurisdiction to make such an order, even admitting, as it is admitted here, that the proceedings were instigated by Hamilton and were prosecuted on his behalf and for his benefit.

These points were urged before and fully considered by the Courts below. It is not necessary to form or express an opinion at present as to the effect of any of the provisions of the Judicature Act and the Consolidated Rules in enlarging the powers and jurisdiction of the Court as regards directing payment of costs by persons not parties to the original proceeding, though it may well be that such is the case. The decision now sought to be appealed from does not appear to introduce a novel rule of practice—one hitherto unconsidered and now acted upon for the first time by the Courts. While apparent conflict between some of the early and the later decisions may be pointed at, it is plain that objections founded on technical reasons are no longer permitted to prevent the Court from dealing, so far as costs are concerned, with one who has so intervened as to make himself the substantial though not the ostensible party.

The decision in question here does not appear to carry the rule beyond what appears to be well established by decisions under somewhat similar circumstances.

No special reason appears for permitting the applicant to carry further a question of this kind, especially where the amount involved is so far under the statutory sum. It would not be proper to grant leave to appeal on the mere

question whether the Court properly exercised its discretion in the circumstances of this case, even if that point appeared more doubtful than at present it seems to me to be.

The motion must be refused with costs.

COURT OF APPEAL.

JANUARY 16TH, 1912.

REX v. JESSAMINE.

3 O. W. N. 753; 32 C. L. T. 280.

*Criminal Law — Murder — Insanity — Uncontrollable Impulse—
Knowledge of Nature of Act—Criminal Code, s. 19 (2).*

The prisoner was charged with murder. The defence was insanity. Medical evidence was given that the prisoner was insane, incurably so, that he understood the nature and quality of the act and that it was wrong in the sense that it was forbidden by the law, but he had lost the power of inhibition, and could not resist the impulse he had to kill Lougheed, for whom he had watched on the street and shot several times, killing him almost instantly.

COURT OF APPEAL held that the prisoner was rightly convicted. *R. v. Creighton* (1908), 14 Can. Cr. Cas. 349, followed.

The prisoner was tried on a charge of murder before HON. MR. JUSTICE RIDDELL and a jury, at Toronto, November 13th, 1911.

It appeared that he had watched for one Lougheed upon the street and shot him several times, killing him almost instantly.

The defence was insanity.

The medical evidence was that the prisoner was insane, incurably so, that he understood the nature and quality of the act and that it was wrong in the sense that it was forbidden by the law, but he had lost the power of inhibition, and could not resist the impulse he had to kill Lougheed.

HON. MR. JUSTICE RIDDELL, charged the jury: "It is not the law that an insane man may kill whom he will without being punished for it. It is not the law that an insane man may kill another and escape punishment simply because he is insane. There have been hundreds of insane persons who have killed others and who have been executed, both in England whence we take our law, and in Canada in which we live. . . . Life would not be safe under such

circumstances. There is one in every three hundred persons in most countries . . . of persons who are insane in one way or another, and it would never do if the law were such that one man out of every three hundred—that is in Toronto something over a thousand people—could go out and slay at will without being brought to task and punished by the strong arm of law . . . a man is not to be acquitted on the ground of insanity unless his mind is so affected by that insanity as that he is not capable of appreciating the nature and quality of his act and of knowing that such act was wrong. It is not the law here as it is said to be in some countries, that if an insane person who is capable of appreciating the nature and quality of the act and of knowing that it is forbidden by law—for that is the meaning in this connection of the word “wrong”—yet as what is called an impulse to do the act which impulse he cannot resist, then he is to be acquitted on the ground of insanity. . . . I charge you as a matter of law that it is not enough for the prisoner to have proved for him . . . that he had lost the power of inhibition—the power of preventing himself from doing what he knew was wrong. . . . It is your duty to find a verdict of guilty if you find that the prisoner killed Loughheed . . . and at the same time it has not been proved to your satisfaction that the condition described by Dr. Bruce Smith was not his actual condition—in other words if he killed the man and it has not been proved that his condition was not as Dr. Bruce Smith says it was, he is guilty of murder and it is your duty to find so.”

The prisoner was convicted and sentenced to death.

HON. MR. JUSTICE RIDDELL refused to state a case upon the question whether the prisoner, being undoubtedly insane, could be executed; but reserved a case for the opinion of the Court of Appeal, upon his above charge to the jury, as follows: “Was I wrong (to the prejudice of the prisoner) in charging the jury that, even if the prisoner was insane, if he appreciated the nature and quality of the act and knew it was wrong, they should not acquit on the ground of insanity, and that the existence of an irresistible impulse did not (even if they believed it to exist) justify an acquittal on the ground of insanity?”

The case in the Court of Appeal was heard by HON. SIR CHAS. MOSS, C.J.O., HON. MR. JUSTICE GARROW, HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MEREDITH and HON. MR. JUSTICE MAGEE.

T. C. Robinette, K.C., for the prisoner.

J. R. Cartwright, K.C., and E. Bayly, K.C., for the Crown.

THEIR LORDSHIPS, without calling upon the counsel for the Crown, answered the question in the negative and affirmed the conviction. *R. v. Creighton* (1908), 14 Can. Cr. Cas. 349 followed.

COURT OF APPEAL.

FEBRUARY 1ST, 1912.

RE SISTERS OF THE CONGREGATION OF NOTRE DAME AND CITY OF OTTAWA.

3 O. W. N. 693.

Assessment and Taxes — Exemption — Education Buildings — Letting Room in—Liability for Taxes.

COURT OF APPEAL held that the letting of rooms to persons other than students of a seminary of learning, in one of the buildings belonging to and used by that seminary for its ordinary purposes—the whole of the income so derived from the building being used for the purposes of the seminary—does not render the whole seminary liable to taxation, but it does render the whole of such building in which rooms are let, liable to taxation.

Case referred to a Judge of the Court of Appeal by the Lieutenant-Governor, by orders in council, dated respectively the 27th September and the 21st November, 1911, pursuant to the provisions of sec. 77 of the Assessment Act, 4 Edw. VII., ch. 23.

The questions referred arose upon an appeal to the Judge of the County Court of the county of Carleton, by the Sisters of the Congregation of Notre Dame, from the decision of the Court of Revision of the city of Ottawa in respect to an assessment under the Assessment Act.

The facts were stated as follows:—

The Sisters of the Congregation of Notre Dame are the owners of a property on Gloucester street, in the city of

Ottawa, used as a seminary of learning for educational purposes, known as "The Gloucester Street Convent." In 1909, the Sisters acquired an adjoining property, known as No. 50 Nepean street, on which is a building, formerly occupied as a dwelling-house. This building has been attached to the main convent premises by a covered passage-way. Two of the large rooms on the ground-floor have been made into one, which is used as the primary class-room of the Convent. Another large room in the third storey is used as the art studio of the Convent. Of the bed-rooms, five are occupied by Sisters of the Congregation, and nine are occupied by lady students of the Normal School at Ottawa, who take their meals in the main building of the Convent, and some of whom take tuition in art, music, and French at the Convent. These lady students use the primary class-rooms for their general purposes after school-hours. The revenue derived from them is entirely devoted to the purposes of the seminary.

The following questions of law were submitted for the opinion of the Court of Appeal:—

1. Does the letting of rooms to persons other than students of a seminary of learning, in one of the buildings belonging to and used by the seminary for its ordinary purposes—the whole of the income so derived from the building being used for the purposes of the seminary—render the whole of the buildings and property of such seminary liable to taxation?

2. If question No. 1 is answered in the negative, does the letting of rooms to persons other than students of a seminary of learning, in one of the buildings belonging to and used by that seminary for its ordinary purposes—the whole of the income so derived from the building being used for the purposes of the seminary—render the whole of such building in which rooms are let liable to taxation?

3. If questions Nos. 1 and 2 are both answered in the negative, then according to what method should the building in which such rooms are let be taxed?

The case was referred by a Judge of the Court of Appeal to the full Court, and was heard by HON. SIR CHAS. MOSS, C.J.O., HON. MR. JUSTICE GARROW, HON. MR. JUSTICE, MACLAREN, HON. MR. JUSTICE MEREDITH, and HON. MR. JUSTICE MAGEE, J.J.A.

E. Bayly, K.C., for the Attorney-General for Ontario.

D. J. McDougal, for the Sisters of the Congregation of Notre Dame.

J. T. White, for the Corporation of the city of Ottawa.

HON. SIR CHAS. MOSS, C.J.O.:—The Court has considered the case and the questions submitted, and are of opinion that, upon the facts stated in the case, the questions should be answered as follows:—

1. The first question in the negative.
2. The second question in the affirmative.
3. Having regard to the foregoing answers, no answer to the third question is called for.

MASTER IN CHAMBERS.

FEBRUARY 24TH & 28TH, 1912.

UNION BANK v. AYMER.

3 O. W. N. 771, 773.

Judgment — Summary — Motion for under Con. Rule 603—Application by Defendant for Reference under Con. Rule 607—Discovery of Credit not Allowed Defendant—Sufficient Doubt as to Accuracy of Claim to Justify Reference.

Symon v. Palmers, [1911], 1 K. B. 259, followed.

This action was brought to recover \$1,548.37 due by defendant to the plaintiffs as set out in the endorsement of the writ and affidavit of the manager filed on the motion.

The defendant made affidavit that he believed the above amount was not correct without giving any reasons for this belief, and wished to have a reference to ascertain how that was. He did not deny the affidavit of the manager that he (the defendant) "repeatedly admitted his liability in respect of the indebtedness sued for herein."

A. H. F. Lefroy, K.C., for the plaintiffs' motion.

F. J. Hughes, for the defendant, contra.

CARTWRIGHT, K.C., MASTER (24th February, 1912):—All that defendant is entitled to know can be found out on cross-examination of the manager when the books and vouchers will be produced. There is as yet no defence disclosed

under Rule 607. This is all that defendant can ask for, and the motion will be adjourned until Tuesday or Wednesday for that purpose as may be arranged.

A reference is not to be had in those cases merely because the defendant wishes for it. The other party is not to be put to the resulting expense and delay without some good reason being shewn for such a proceeding.

After the disposition of above motion it was discovered by the defendant and admitted by the plaintiffs that a dividend of \$167.92 under an assignment for benefit of creditors made by defendant in June last, and paid to plaintiffs on 30th November last, ought to have been credited to defendant on his indebtedness. The motion was again brought before the Master.

A. H. F. Lefroy, K.C., for the plaintiffs.

F. J. Hughes, for the defendant.

CARTWRIGHT, K.C., MASTER (28th February, 1912):— This discovery I think throws sufficient doubt on the accuracy of the affidavit in support of the motion from judgment, and discloses such facts as are sufficient to entitle the defendant to have the accounts investigated on a reference, if he still thinks it would be of any advantage to him to be saddled with the costs of that proceeding. Would it not be better even now to have an examination of the plaintiffs' books, and see what the real liability is of the defendant, who is said to be only an accommodation maker or endorser. The defendant should elect as to this in four days.

In view of his financial position the delay will not seriously prejudice the plaintiffs, who cannot complain if the important omission above mentioned gives them some trouble. The very recent case of *Symon v. Palmer*, [1911] 1 K. B. 259, shews how strictly plaintiffs should comply with the requirements of Rule 603.

MASTER IN CHAMBERS.

FEBRUARY 28TH, 1912.

KING MILLING CO. v. NORTHERN ISLANDS PULP-
WOOD CO. AND IMPERIAL BANK.

3 O. W. N. 774.

Pleading—Statement of Claim—Action by Creditors of Company to Set Aside Transfer of Property to Bank—Transfers Alleged to have been Executed without Authority — Order Striking out Allegations from Statement of Claim as Embarrassing Granted—Plaintiffs had no Locus Standi to bring Action—Action could only be Brought by Company or Some of the Shareholders.

International Wrecking Co. v. Murphy, 12 P. R. 423, followed.

Action brought on behalf of the creditors of the Pulpwood Company, to set aside certain transfers made by it to the Imperial Bank of Canada, on the usual grounds.

The 9th paragraph of the statement of claim alleged that these transfers were executed by the officers of the company without authority. The bank moved to have this paragraph struck out, as embarrassing.

M. L. Gordon, for the motion.

F. Aylesworth, for the plaintiffs, contra.

CARTWRIGHT, K.C., MASTER:—The motion is entitled to prevail, as these plaintiffs have no locus standi to bring any such action. That could only be done by the company itself, or by some of the shareholders, if they could not obtain the use of the name of the company as plaintiff. See *International Wrecking Co. v. Murphy*, 12 P. R. 423, and cases cited.

The paragraph in question with the corresponding prayer for relief must be struck out with costs to the moving defendants, in any event.

Time for defence to run from service of order.

MASTER IN CHAMBERS.

FEBRUARY 24TH, 1912.

DOMINION BELTING v. JEFFREY MFG. CO. ET AL.

3 O. W. N. 771.

Parties — Third Parties — Claim against for Relief Over — No Connection of Claim with Main Action—Order for Third Party Issue Set Aside with Costs.

Wade v. Pakenham, 2 O. W. R. 1183, followed. .

Motion before appearance by third parties to set aside order for issue of same.

J. Grayson Smith, for the motion.

H. McKenna (Hamilton), for the defendants, contra.

E. C. Cattnach, for the plaintiffs.

CARTWRIGHT, K.C., MASTER:—The facts as shewn in the third party notice and the affidavit of Mr. McKenna, on which the order was granted are as follows.

The defendants Archer and Gerow, are sales agents of the Jeffrey Manufacturing Co. As such agents they ordered from the plaintiffs, belting to the value of \$1,520, to fill an order which they had obtained from the third parties on 23rd June, 1910.

This order was filled and the full price paid by the third parties to Archer & Gerow at end of September, 1910, by accepting a draft of Archer & Gerow, at 30 days, which was met at maturity. But the proceeds were never paid to the plaintiffs or to the Jeffrey Co.

There is no suggestion that the plaintiffs or the third parties were in any way aware of the precise relations between the Jeffrey Company and their agents. Nor is there any defence set up which the third parties would be interested in supporting. All the Jeffrey Co. can say is that Archer & Gerow had no authority to pledge their credit to the plaintiffs as appears from the statement of claim.

There is here admittedly no case either of contribution or indemnity. Nor does it appear to be one of other relief over.

There is no question raised as between the Jeffrey Company and the third parties, which could be decided in the action as originally instituted. The Jeffrey Company admits

by the affidavit of their solicitor that the plaintiffs have not been paid, though the price of the goods was paid to Archer & Gerow, by the third parties.

The question, therefore, as between the Jeffrey Company and the third parties is simply whether this payment to Archer & Gerow discharged the third parties. This has nothing at all to do with the main action. It is the common case of who is to bear the loss occasioned by a defaulting agent. All that the Jeffrey Company could usefully do would be to notify the third parties of the facts, and state that they did not recognize the payment to Archer & Gerow, so that the third parties might, if so advised, aid them in settling with the plaintiffs without the Jeffrey Company being obliged to take action against the third parties. This did not require the formality of a third party notice, which must be discharged with costs to plaintiffs in any event and to the third parties forthwith after taxation unless the defendants consent to their being fixed at \$25.

I refer to what I said in *Wade v. Pakenham*, 2 O. W. R. 1183, that the test is: 'Are there any common questions or question between all the parties, which if decided in favour of the plaintiff, would give the defendant a right to indemnity (or other relief), against the third party?'

There is nothing in the present case to meet that condition.

MASTER IN CHAMBERS.

MARCH 1ST, 1912.

WARNER v. NORRINGTON.

3 O. W. N. 804.

Costs — Security — Motion for under Con. Rule 1198 (d)—Costs of Former Action not Paid—Action not within the Rule—Motion Dismissed without Costs—Judicature Act, s. 186.

Motion by the defendant for security for costs under Rule 1198 (d).

McDonald (Day, Ferguson, and O'Sullivan), for the motion.

L. S. Cuddy (Wm. Douglas, K.C.), contra.

CARTWRIGHT, K.C., MASTER:—The action of *Norrington v. Warner* was tried at the sittings of the District Court

of Nipissing in June last. It was on an agreement between the parties as to which there was no defence. But Warner set up his statement of defence, a right to an account from Norrington in respect of another mining claim not included in the agreement. This is the subject of the present action brought in the High Court of Justice.

It was not set up by way of counterclaim and the trial Judge refused to give any effect to it, nor did he in any way pass upon it. He says: "It was a private enterprise not covered by the agreement." This, therefore, does not seem to be within the rule, and the motion will be dismissed, but without costs—as the pleadings should have been amended either by having the claim of Warner struck out or set up as a counterclaim—in which case it would have taken the whole matter into the High Court, under sec. 186 of the Judicature Act, if desired by either party.

See *Henders v. Parker*, 11 O. W. R. 211, 315, and cases cited.

MASTER IN CHAMBERS.

MARCH 2ND, 1912.

IRWIN v. STEPHENS.

3 O. W. N. 805.

*Trial — Postponement — Motion for by Defendant—Libel Action—
Change of Venue Granted—Convenience—Con. Rule 529 (d)—
Foreign Commission—To Calgary—Costs in Cause.*

Pollard v. Wright, 16 P. R. 505. followed.

Motion by the defendant for an order postponing the trial for which notice had been duly given for the sittings at Cobourg, on the 5th inst. The motion was made on the ground of the necessity of having the evidence of a witness who resides at Calgary.

J. Grayson Smith, for the defendant's motion.

E. C. Cattanach, for the plaintiff, contra.

CARTWRIGHT, K.C., MASTER:—The action is for libel of the plaintiff alleged to be injurious to him in respect of his business as an undertaker. It arises from an unfortunate incident, which occurred on 6th January last, over the

removal from the Campbellford station of the body of the father of the absent witness. Through some mistake both undertakers had been instructed to take charge of the corpse.

The plaintiff and defendant both reside at Campbellford, so that the case comes within Rule 529 (b), and the venue was properly laid at Cobourg, in the first instance.

The plaintiff alleges that the publications complained of are causing him much damage, and that it is essential that he should be vindicated as speedily as possible. He offers to have the trial at Peterborough sittings commencing on 9th April. He says that place is just as convenient for the witnesses and parties as Cobourg.

This is corroborated by the time tables of the Grand Trunk R.w. Campbellford is not conveniently accessible to or from Peterborough; though it is on the direct line and only 32½ miles distant. There are trains to Peterborough at 6.40 a.m. and 7.23 p.m., and from Peterborough at 8.30 a.m. and 1.40 p.m. But to reach Cobourg you must go first to Belleville, 30 miles, and then from Belleville to Cobourg, 44 miles. Trains leave Campbellford at 9.56 a.m. and 3.06 p.m., reaching Belleville at 11.10 a.m. and 4.25 p.m. and Cobourg at 12.52 p.m. and 5.28 p.m. respectively. On the return journey a passenger must leave Cobourg at 4.30 p.m., reaching Belleville at 5.55 p.m. and getting to Campbellford at 7.23 p.m., or leave Cobourg by one of the night trains so as to leave Belleville at 5.20 a.m. and reach Campbellford at 6.40 a.m.

The expense of the journey from Campbellford to Cobourg would appear to be more than twice that of the journey to Peterborough. If the trial took place there the witnesses and parties would have to stay a night. But if it was at Cobourg, they would have to spend one night there and be travelling the next night so as to reach home on the third day of absence.

Under these circumstances, I think, that a case is made out under 529 (d) as defined in *Pollard v. Wright*, 16 P. R. 505, and other cases to change the place of trial to Peterborough, as a term of granting the commission asked for by the defendant, and postponing the trial until 9th April to allow the evidence to be returned.

The order should require the commission to be despatched from Calgary, not later than March 25th, so as to be available to the parties in good time.

The costs of this motion will be in the cause and the other costs of the commission will be in the Taxing Officer's discretion unless dealt with by the trial Judge.

DIVISIONAL COURT.

MARCH 19TH, 1912.

FARMERS BANK OF CANADA v. HEATH.

3 O. W. N. 805.

*Process — Service of Writ of Summons — Out of Jurisdiction —
Leave to Enter Conditional Appearance—Question as to where
Cause of Action Arose—Place of Payment.*

An appeal by the defendant from an order of HON. MR. JUSTICE CLUTE in Chambers, pronounced 1st March, 1912, dismissing an appeal from an order of the Master in Chambers, 21 O. W. R. 283, dismissing an application by the defendants to set aside an order made, allowing the issue of the writ for service out of the jurisdiction and the service of same.

The appeal to Divisional Court was heard by HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B., HON. MR. JUSTICE BRITTON, and HON. MR. JUSTICE SUTHERLAND, on the 19th March, 1912.

Shirley Denison, K.C., for the defendant.

J. Bicknell, K.C., and M. Lockhart Gordon, for the plaintiffs.

THEIR LORDSHIPS (V.V.) dismissed the appeal with costs to the plaintiff in any event.

DIVISIONAL COURT.

MARCH 5TH, 1912.

YOUNG v. TOWNSHIP OF BRUCE.

*Negligence — Highway — Commercial Traveller in Omnibus —
Thrown down Steep Embankment—Action for Damages — No
Railing on Side of Road.*

Plaintiff, a commercial traveller, brought action to recover \$500 damages for injuries received while in an omnibus by being thrown down a steep embankment on the Goderich and Saugeen road on 8th December, 1909, which was alleged to be owing to negligence of defendants in not having a railing on either side of said road. At trial, Bruce County Judge dismissed the action with costs on the ground that no sufficient notice of action had been served on defendants.

DIVISIONAL COURT, 20 O. W. R. 87, 3 O. W. N. 89, *held* that what the statute requires is "notice of the accident and the cause thereof." That the Court should refrain from attempting to add anything to that which is required by the statute. The statute does not require time nor place in so many words, while it would be no doubt wise in framing a notice to mention both.—*Held*, upon the evidence given that the notice was sufficient and the case should be remitted for trial on the merits. Costs in the cause.

BRUCE COUNTY JUDGE dismissed plaintiff's action upon the merits, with costs.

DIVISIONAL COURT dismissed plaintiff's appeal with costs.

An appeal by the plaintiff from a judgment of His Honour the Judge of Bruce county, pronounced on 23rd January, 1912.

This was the second time the case came before His Honour, it having been remitted to him, by Divisional Court, 20 O. W. R. 87, to deal with the case upon its merits.

HIS HONOUR found in favour of the defendant municipality and dismissed the plaintiff's action with costs.

The appeal to Divisional Court was heard by HON. SIR JOHN BOYD, C., HON. MR. JUSTICE LATCHFORD and HON. MR. JUSTICE MIDDLETON on the 5th March, 1912.

A. M. Lewis, for the plaintiff, appellant.

R. McKay, K.C., for the defendants. respondents.

THEIR LORDSHIPS dismissed plaintiff's appeal with costs.

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DIVISIONAL COURT.

MARCH 20TH, 1912.

STONESS v. ANGLO-AMERICAN INS. CO.

3 O. W. N.

Insurance—Fire—Interim Receipt—Duration of—Effect of—Absence of Written Application with Questions and Answers—Materiality.

Defendants' agent issued an interim receipt for a \$2,000 policy of fire insurance. There was no formal application with questions and answers. Defendants' agent notified them and referred to another policy which they had previously cancelled owing to the premises being then unoccupied. The agent stated to defendants that the applicants had purchased the property, but this was not the case, they only held the same under lease. Defendants neither issued a policy nor refused the application. Loss occurred and action was brought.

RIDDELL, J., *held*, 20 O. W. R. 800, 3 O. W. N. 494, that there was a valid contract for insurance for a year, and that nothing subsequent took place to modify or impair it.

Coulter v. Equity Fire Ins. Co. (1904). 4 O. W. R. 383, 9 O. L. R. 35, followed.

That a notice, "If policy is not received within 30 days the assured is required to notify the head office," printed at the top of the interim receipt, is no part thereof and has no effect on the receipt.

That defendants had no right to relief over against their agent for misstatement as to the ownership of the property, as there was no evidence to shew that the defendants' action was in any way effected thereby.

Judgment for plaintiff for \$2,077.50 with costs.

DIVISIONAL COURT varied above judgment, holding that the extra premium not received by the company and the extra expense incurred by the company in the litigation should be awarded the company as damages payable by the agent on account of the misleading manner in which the situation was placed before the Head Office, and also by reason of his inaction in not carrying out his undertaking to supply the further information that was needed to enable the Head Office to appreciate the danger of the risk by being in possession of the conditions under which the operations of the insured were being conducted.

The finding that the company was liable to pay the amount of the "interim receipt" policy and costs of action affirmed.

That the company should pay the plaintiff one-half costs of appeal; this division of appeal costs because the insured and the agent joined in the appeal.

That the agent should pay the company \$80 damages for extra risk and taxed costs of action of both the insured and the company.

An appeal by the defendant company from a judgment of HON. MR. JUSTICE RIDDELL, 20 O. W. R. 800.

The appeal to Divisional Court was heard by HON. SIR JOHN BOYD, C., HON. MR. JUSTICE LATCHFORD, and HON. MR. JUSTICE MIDDLETON, on the 7th March, 1912.

F. E. Hodgins, K.C., for the defendants, appellants.

J. L. Whiting, K.C., for the plaintiff and third party respondents.

HON. SIR JOHN BOYD, C.:—The learned Judge found that the risk in question was of a hazardous (perhaps extra hazardous) character and that a larger premium should have been paid than was collected by the agent. He should have charged double the amount at least, i.e., \$80 instead of \$40. None of this has been paid to the company.

The learned Judge again finds that if he had power he would be strongly inclined to allow the agent to pay the costs throughout, as no doubt, the whole matter had been largely due to his negligence . . . he thinks his conduct was such as to justify a direction that the costs of the litigation should be paid by that agent; but he apparently doubts the power so to do.

I think that both these items, the extra premium not received by the company and the extra expense incurred by the company in this litigation, may be rightly included as damages payable by the agent on account of the misleading manner in which the situation was placed before the Toronto officer, and also by reason of his inaction in not carrying out his undertaking to supply the further information that was needed to enable the head office to appreciate the danger of the risk, by being informed of the conditions under which the operations of the insured were being conducted.

I see no ground to disturb the finding that the company is liable to pay the amount of the "interim receipt" policy, and costs of action. The company should also pay the plaintiff half costs of appeal. (This division of appeal costs because the insured and the agent join in opposing the appeal).

But as to the agent, I think, the appeal should be allowed with costs, and that he should pay as damages \$80 (for extra risk), and the amount of the taxed costs of action of both the insured and the defendant company.

I have no reason to doubt that the company would have reinsured the risk to the extent of \$1,000 if they had been aware that they were legally responsible for the \$2,000 insurance. The company had so reinsured as to the earlier policy on this property when it was operated by the present plaintiff, and would have done so again. But I do not see my way to charge this as damages on the agent, because the company might have acted so to protect, had they not been in error as to the expiry of the interim receipt in 30 days.

If an officer of the Court combines a variety of engagements, acting as agent of an insurance company and also acting for the owner and lessees of property to be insured, and is also a mortgagee of the property which is assigned to another, and then gets matters so mixed up that he gives the insurance company to understand that the insurance is for the benefit of a new concern, which has purchased the plant and property from the owner, whereas the real transaction is that the lessees insure in the name of the owner for the benefit of the mortgagee: given this situation, the knowledge of which is confined to the solicitor, who is also the original mortgagee and the insurance agent, and not communicated to the company till after the fire, it is little wonder that an investigation in the Court is called for, and is needed before the tangle is cleared up, and, even as it is, is not satisfactorily cleared up.

Nor is the situation simplified by the insurance agent acting as solicitor and chief witness in this suit for the plaintiff, a stranger to the insurance company.

That the Court has ample power to order payment of costs by a third party, and to deal with him in this respect as a defendant, is shewn by *Hornby v. Cardwell*, 6 Q. B. D. 329; *Piller v. Roberts*, 21 Ch. D. 198, 201; *Edison & Swan United Electric Light Co. v. Holland*, 41 Ch. D. 28, 34, and many other cases.

HON. MR. JUSTICE LATCHFORD and HON. MR. JUSTICE MIDDLETON:—We agree.

COURT OF APPEAL.

MARCH 19TH, 1912.

DAVEY v. FOLEY-REIGER CO.

3 O. W. N.

Watercourses—Trespass to Lands—Adjoining Proprietors of Pulp Mills — Cross-wall — Tail-race—Rights not Extinguished—No Alteration of Tenement — Enjoyment of Easement — License—Action for Damages—Question of Boundaries Affected the Rights and Liabilities of the Parties—Construction of Description in Title Deed—Rights and Incidents of Easements.

An action between pulp manufacturers carrying on business in the village of Thorold, on adjoining properties in reference to their respective water rights. The plaintiff had maintained a stone wall for over 25 years, and the defendants took down the wall, and the action was brought for trespass and for an injunction restraining defendants from discharging into the tail-race of plaintiff's mill a volume of water much greater than was formerly discharged therein by defendants' predecessors in title, and for damages for trespass in entering on land which the plaintiff alleged was his, and breaking down the stone wall. The defendants denied claims and counter-claimed, asking an injunction to restrain plaintiff's use of the tail-race.

BRITTON, J., *held*, 19 O. W. R. 195, 2 O. W. N. 1028, that the building of the wall did not extinguish any rights of defendants, there being no alteration in the condition of the dominant tenement. That the work done and alterations made by defendants were reasonably necessary for the enjoyment of their easement. That no damages were proved. Action and counterclaim dismissed with costs.

DIVISIONAL COURT, 19 O. W. R. 531, 2 O. W. N. 1284, varied judgment of BRITTON, J., holding that the title to the tail-race was vested in the defendants, that the defendants were entitled to break the wall in question, but that plaintiff was entitled to an easement acquired by prescription in the tail-race, and that defendants were only entitled to discharge into the tail-race 100 h.p. of water, but that the defendants had the right to enlarge the tail-race to such an extent as would enable the increased discharge needed by them.

Held, that effect should be given to the particular description, the more so as there was no repugnancy.

Attrill v. Platt, 10 S. C. R. 425, followed.

COURT OF APPEAL varied judgment of Divisional Court by declaring parties entitled in common to a small triangular piece of land for their respective raceways, with all necessary directions and variations consequent on such declaration. No costs of appeal.

MAGEE, J.A., dissenting.

An appeal by the plaintiff from a judgment of Divisional Court, 19 O. W. R. 531, reversing a judgment of HON. MR. JUSTICE BRITTON, 19 O. W. R. 195, dismissing the action.

The appeal to the Court of Appeal was heard by HON. SIR CHAS. MOSS, C.J.O., HON. MR. JUSTICE GARROW, HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MEREDITH, and HON. MR. JUSTICE MAGEE.

M. K. Cowan, K.C., for the plaintiff, appellant.

W. M. German, K.C., for the defendants, respondents.

HON. SIR CHARLES MOSS, C.J.O.:—The dispute between the parties to this action when narrowed down to the substantial merits seems to lie within a comparatively small compass.

The raceway from the defendants' factory crosses from what is undoubtedly his property over a small triangular piece of land and merges in an artificial water-course situate on land, which is undoubtedly the property of the Government of Canada. The waters flowing in this water-course are the waters which emerge from the tail-races of the respective factories of the plaintiff and defendants, which are situate on adjoining lands. Each of the parties claims title to the triangular piece. The learned trial Judge found in favour of the plaintiff's claim of title, but on the whole case dismissed the action. A Divisional Court held that the title was in the defendants, but subject to an easement entitling the plaintiff to discharge the water flowing from his factory to a certain specified extent. Upon the argument in this Court these contentions were renewed.

The determining factor appears to have been the exact line of the south-west boundary of the plaintiff's parcel of land. So far as the conveyances are concerned they do not furnish as much light as could be desired. The descriptions are general, vague and uncertain. This might be accounted for by the fact that all the earlier conveyances were among members of the family of George Keefer, who was the owner of both properties from 1826 until the time of his death, probably in the latter part of 1857, or the early part of 1858. He and those of the family to whom conveyances were made, as well as those of the family making such conveyances, were in all likelihood familiar with the position and limits of each parcel. At the date of George Keefer's death there was on the parcel now owned by the defendant, a flouring mill which had been there from a very early date, certainly as early as 1831; and on the plaintiff's parcel a wooden building used as a cotton factory. When this was first built does not definitely appear, but probably as early as 1852. This was replaced by a stone building, probably between 1868 and 1870, but whether the walls of this building stood precisely on the same spot as the walls of the

wooden building does not appear. Each used water from the Government head-race to the east, and each discharged by separate means into the tail-race over what was then the property of the Provincial Board of Works, and is now the property of the Government of Canada. The first conveyances after George Keefer's death which indicated limits separating these parcels were three deeds, dated March 24th, 1862, and made by John G. Keefer as grantor, the respective grantees being Catherine Eastman, John Keefer, and Thos. C. Keefer. They contain no description by metes and bounds and the estate or interest granted by each deed is one undivided third of the lot and cotton mill thereon erected, north side Mill street on the north of the Keefer mill on the east side of the Welland Canal together with one-third of the water and all other privileges thereunto attached, appertaining or belonging. These grants were not made by owners of the Keefer mill parcel, and the descriptions could not vary the description by which George Keefer had devised the Keefer mill parcel to his three sons George, Peter, and John Keefer, viz., "all the large stone mill and lot of land thereunto belonging, with all the water privileges of the same as granted to me and my heirs forever by the Board of Works." It seems plain that the testator intended that the water privileges which were originally and primarily attached to this parcel and involved the triangular piece should continue undisturbed in so far as the water rights and all that was necessary to secure them as theretofore were concerned. And throughout the various descriptions and conveyances there is not to be found any that shew at all definitely or distinctly any intention on the part of the devisees of this parcel, or of those claiming under them, ever to relinquish or grant away these rights. Indeed, the conduct and dealings of the parties, the nature of the use made of the common tail-race, the acquiescence for years by the respective proprietors in everything that was done by his neighbour in regard to the discharge of water from their respective mills or factories over the small portion in question, all go to shew that it . . . was considered and treated as common ground in which each proprietor had equal privileges and equal rights.

This involves, of course, a mutual obligation not to infringe upon each other's rights or to do anything which may unreasonably and materially interfere with the other's enjoyment of his rights.

I agree with the Divisional Court that the defendants have in some of the respects indicated in the judgment of that Court improperly interfered, and that they should pay the damages fixed and be prohibited from continuing their obstruction in contravention of the plaintiff's rights. But I base my agreement to this extent upon the ground that the defendants and plaintiffs have equal rights and not upon any ground of superiority of title in either.

In my view the judgment appealed from should be varied by striking out the declaration relating to the title to the raceway in question, and the rights of easement thereover, and substituting a declaration that the parties are entitled in common to the use of the triangular piece of land forming the raceway, with all necessary directions or variations from the judgment appealed from as may be consequent thereon; and that with such variations the appeal should be dismissed without costs.

Should any question arise as to the form of the certificate it may be settled in Chambers.

HON. MR. JUSTICE MACLAREN:—I agree.

HON. MR. JUSTICE GARROW:—The action was brought to obtain an injunction restraining the defendants from discharging water on or over and along the plaintiff's property, and for damages. The facts are stated in the judgment of Britton, J., and are summarised by Middleton, J., who delivered the judgment of the Divisional Court, and need not be here repeated at any length.

The descriptions in the early conveyances of the properties in question are far from being satisfactory. A parcel called a "mill" or "grist mill" appears upon the registered plan which was produced at the trial but not filed, and is identified as the "Keefer mill" now owned by the defendants. But the plaintiff's parcel the "cotton factory" lot is not even set out by name in that or any registered plan. The Keefer mill has, it is said, existed at least since the year 1827. The cotton factory mill was built after that and before the year 1862, but how long before does not appear. Both properties were originally owned by George Keefer, and the first conveyance of the plaintiff's parcel as a separate parcel is that from the heirs of George Keefer to John G. Keefer, dated October 21st, 1862, which

thus necessarily forms the root of the plaintiff's title. In that conveyance the parcel is described as "A lot of land upon which a cotton factory has been erected, with a water privilege, on the east side of the Welland Canal on the north side of Mill street, north of the Keefer mill." This description, although indefinite, was doubtless understood at the time by the Keefer family who had owned both properties, and in subsequent conveyances the descriptions became more definite, with the result that the boundary line between them was fixed as midway between the walls of the building then erected upon the two parcels. Britton, J., was of opinion that the wall which the defendants partially demolished in September, 1910, was built upon the plaintiff's side of this line. It may be so, but even if it is, it is not, in my opinion, a determining circumstance, for the reasons which I will presently give.

The "water privilege" cannot have had reference to the receipt of the water into the mill, for that was not under the control of the grantors, but of the Crown. It must, therefore, have referred to its discharge after use, a necessary part, of course, of a water privilege. And as the grant was of a lot having upon it at the time a mill or factory using the water as its motive power, it was probably intended that the mode of discharge then in use should pass. This was apparently the opinion of Middleton, J. But that learned Judge was under the impression that such mode of discharge consisted in the use of the flume spoken of in the evidence, and largely upon that conclusion his judgment apparently rests. That conclusion, however, seems to me with deference to be erroneous. Mr. Grenville, a witness called by the defendant, stated that he had known the properties since boyhood. He was born in the town in the year 1852. and, had, when a young man, been employed in the Keefer mill. The flume, he said, was not erected until about the year 1870, or eight years after the plaintiff's title began. Before that the cotton factory mill had used an overshot wheel and discharged the water practically as at present, that is as I understand it into the present tail-race. This evidence is not contradicted, as it easily might have been if untrue. It presents a state of facts which in itself is quite reasonable, and in apparent harmony with the subsequent acts and conduct of the parties, a very material consideration where one is compelled, as here, to grope for a

definition which the parties might have, but have not, made plain in their written documents of title.

When the plaintiff purchased, he proceeded to make and made very extensive changes in the cotton factory mill. He increased its power by putting in new and lower wheels. He abandoned the flume method of discharge and used instead the present tail-race which he straightened and somewhat improved, and in common with the Keefer mill has used ever since.

If he had then only for the first time began to use this tail-race, one would naturally expect to hear of at least some protest by the owners of the Keefer mill, but nothing of the kind appears. Then the plaintiff himself admits that while he did not ask for or obtain any consent to his other changes and improvements, he did obtain the consent of Mr. Lawson, the then owner of the Keefer mill, to the erection in 1886 in connection with his changes and improvements, of the wall in question, which was built under the water in the body of the raceway, although he contends that such wall was within his own boundary-line, as was held by Britton, J.

One object in building the wall was for the protection of the rubble wall upon the Keefer mill property. It might even, upon the evidence, be inferred that that was its main object as Mr. Foley in his evidence says it was. But even the plaintiff admits that a part at least of the object was that which Mr. Foley states, namely, the protection of the rubble wall.

Under these circumstances, I have no difficulty at all in arriving at the conclusion that the plaintiff's water privilege was intended by the parties to be the right to use the tail-race in question in common with the Keefer mill property now owned by the defendants. The defendants, intending to do as the plaintiff had done in 1885, began last year to improve the Keefer mill property and to increase its capacity. And, in doing so, the little wall upon which the plaintiff sets such store was in the way and was in part removed. The plaintiff contends that he had acquired a title to its use under the Statute of Limitations. With that contention I cannot agree. Both parties were in possession of the raceway, and Mr. Lawson's consent to the erection of the wall, under the circumstances, should be construed as a revocable license, and not as, in effect, the plaintiff contends,

an undertaking that no future changes or improvements should be made in the Keefer mill. Both parties were, I think, perfectly at liberty to make any changes or enlargements which they desired in their respective mills, so long as they did not thereby involve a use of the tail-race which would be injurious to the other property. The defendants' recent changes involve a further enlargement and straightening of the raceway which it is said, and practically not disputed, can easily be made sufficient to carry away all the water from both mills. The mistake which the defendants made was in first interfering with the wall, which when the changes are completed would have been merely a useless obstruction.

Such enlargement they are now by the injunction under bonds to make at their own expense, and for their mistake they have been condemned by the Divisional Court to pay as damages \$250, a result with which I do not feel called upon to interfere.

The judgment should, however, be amended so as to declare the parties to be entitled to the use in common of the raceway, instead of the present declaration as to title therein contained. And there should be no costs of the appeal.

HON. MR. JUSTICE MEREDITH:—Whether the rights of the parties, in question in this action, are vested upon their title deeds, or upon long user, the result is the same, when the facts are rightly understood; though they are plainer in the latter view; and that result is that neither party has a right to prevent the use, by the other, of the tail-race in question so long as such a user does not injuriously affect the user by the other; and it is sufficiently proved that by a proper enlargement of the capacity of the tail-race the increased capacity of the defendants' mill can be maintained without any obstruction to the flow from the plaintiff's mill as it now is; and so any injunction against the defendants should not extend beyond the time when such an enlargement of the capacity of the tail-race shall have been made by the defendants.

The plaintiff's claim in respect of the small stone wall erected by him, in the tail-race, is not well founded, even upon his own testimony rightly interpreted. It was built, I have no doubt, for the same purposes only as that for

which the loose stone wall which preceded it, was made by the then owner of the defendants' mill; that is the protection of the water wheels of that mill from "burning out." The plaintiff, in deepening the tail-race, for his own purposes, disturbed the protection which the loose stone wall afforded, and, therefore, built the wall in question to restore it, which it did. Having been built in that way and for that purpose—altogether for the benefit of the defendants' mill and in substitution for its loose stone wall—there is no reason why the owners of that mill might not remove it, as they might have removed the loose stone wall. The plaintiff's somewhat belated, and, to me, quite unsatisfactory, effort to make it appear that the substituted wall had some other purpose and effect, proves nothing more.

The defendants should be enjoined from using their increased water discharge, into the tail-race, until they have made sufficient provision for carrying it off, and shall carry it off, without obstructing the capacity of and discharge from the plaintiff's mill now existing; and should pay the damages awarded to the plaintiff by the Divisional Court, the amount being reasonable. They should also, I think, have been ordered to pay the plaintiff the general costs of the action, including the appeal to the Divisional Court; but, as that was not done, it is but fair that no costs should be awarded against him here, though, in the substantial result, failing upon this appeal.

HON. MR. JUSTICE MAGEE (*dissenting*):—The plaintiff's parcel of land adjoins the north side of that of the defendant company. Together they do not exceed an acre. Both lie between two strips of Government land, one on the west bordering the east side of the Welland Canal and the other on the east containing the head-race which supplies the mills of both parties and is itself fed from the canal. The mills are worked by water obtained by rental or permission from the Government from the surplus canal waters. The tail-race from the defendants' mill runs somewhat northwesterly past the plaintiff's mill across what he claims as his land and then more northerly through the Government land and discharges into the canal at the level of lock 23. It cuts off to the west of it a very small triangular parcel not over fifteen square feet apparently at the south-west angle of the land claimed by the plaintiff. The plaintiff's mill also dis-

charges its waters into the tail-race by a channel running westerly from the mill. A spillway runs westerly from the head-race to the tail-race, its northern edge being south of but near to the admitted boundary line there. That admitted boundary from the head-race to the tail-race is about 24 feet and 1 inch north of the defendants' mill. The plaintiff claims that that line continues as the boundary through to the Government canal land. Each party claims to own the soil of the tail-race north of that line and that the other has only an easement for discharging through it a limited quantity of water, the owner's own right being limited only by non-interference with such limited right of the other.

Both parcels form part of 100 acres owned in 1826 by George Keefer. In 1824 the Welland Canal Company was incorporated and subsequently the canal was taken over by the Board of Works of the then province of Canada. By deed dated 13th November, 1845, made between George Keefer and the Board of Works reciting that he had permitted the canal company to occupy about 24 acres without having executed a conveyance and that he had consented to execute a deed of the same "in consideration of the Board of Works allowing to him, his heirs and assigns forever the use of a sufficient quantity of water to work the flouring mill and all the machinery connected therewith at present in the possession and known as the property of the said George Keefer at the village of Thorold whenever there may be any surplus of water in the canal beyond what may be considered necessary for the purposes of the canal by the Board of Works or their agent." George Keefer conveyed to the Board 24 acres and 27 perches covering the canal and land on each side and also some additional lands. One of the easterly boundaries runs from a stake 20 feet from the south-west corner of George Keefer's stone mill northerly 350 feet to a point opposite the head of lock 24. Beyond the recital there is no grant by the Board of the right to water and no mention of disposal of it and there is no reservation by Keefer of any right to the tail-race across the lands granted by him. In his will in 1855 he speaks of the water privileges granted him by the Board of Works. It would not be too much if it were necessary here to presume a grant both of the water and the right to discharge it through the Government lands.

The flouring mill there mentioned is now the defendants' mill or forms part of it. An old plan of 1827, registered in 1831, shews a grist mill at this point and indefinitely indicates an irregular water channel running northerly therefrom somewhat as does the present tail-race. It is not suggested that it ever was a natural water-course.

As regards the subsequent title both parties with praiseworthy but unsatisfactory economy have put in only registrars' abstracts of registrations giving very meagre particulars. If one errs in any of the assumptions which have to be made as to their effect the original document or copies should be produced.

George Keefer evidently died between 13th July, 1855, the date of his will and 2nd July, 1858, when it was registered. The abstract shews a devise to his three sons, George, Peter and John, of "all the large stone mill and lot of land thereunto belonging with all the water privileges of the same as granted to me and my heirs forever by the Board of Works." Another abstract mentions that George and John and Thomas C. Keefer were executors—no other parts of the will are set out and I assume that no further light would be given as to the exact extent of this devise. It is conceded, however, that the stone mill is now the defendants' mill or forms part of it—we are not informed what he did with the rest of his lands nor what other children or heirs he left.

For all that appears, however, the "mill and lot of land thereto belonging" may have included both parcels if the plaintiff's land was not then built upon. Indeed we find that on 22nd July, 1830, he had given a mortgage on one and a fifth acres upon which was erected a large stone mill and which evidently included both these parcels and some adjoining land, and the description commences at the south-east angle of "the said lot." There seems to have been a lease of the stone mill and premises on 30th April, 1856, but the abstract gives no further indication of the size of the lot or by whom the lease was made. If he really had in view a division one would expect to find some provision as to water privileges for each parcel. There is no evidence of any fence or other division mark nor of the existence of any building on the plaintiff's land before the testator's death. None is shewn on the old map of 1827 nor referred to in the deed of 1845 nor in the will of 1855, and the earliest

mention of a building is by a witness for defendants, Thomas Grenville, who was born in 1852 and professes to remember being in the cotton factory thereon when he was six or seven years old. The earliest mention of the cotton factory in any document produced is in October, 1862.

If it could be shewn that the testator had in mind a separation of the two parcels with no contemplation of water power for the northern parcel then a very natural division would be to give with the flouring mill all that was used with it alone and if so the northern edge of the spillway if then existing and the northeast side of the tail-race would have been a very natural and complete northern boundary. The plaintiff says "there was always a spillway," but I am not sure that he is not referring to one at Lawson's dam across the tail-race. That boundary would give the soil of the tail-race as well as the mill to his three sons. As the rights of these parties in my view depend upon subsequent act and documents and not upon the will it is not really necessary to know what he intended. It may be that even before his death there was a line of division known in the family and according to which the devise was made and that line may have been just the one which was afterwards declared and which would not give those three devisees the tail-race.

In 1863 was registered a deed marked in the registrar's abstract Q. C. (quit claim) dated 21st October, 1862, from George, Peter, Jacob, Samuel, Janus, Augustus, Alexander and Thomas C. Keefer, Elizabeth Hamot Ann Kelso (with her husband) Catherine Eastman and Amelia McFarland to John G. Keefer covering inter alia "a lot of land upon which a cotton factory has been erected with a water privilege on the east side of the Welland Canal on the north side of Mill street north of the Keefer mill." This cotton factory, a wooden building subsequently rebuilt of stone after a fire is now part of the plaintiff's mill and this is the first documentary reference to its existence. A part of its southern wall is yet standing.

I assume that as seems to have been admitted (p. 30) this deed by a grant or release conveyed to John G. Keefer the interest of the other parties to it in the land mentioned in it and that they or some of them alone or with John G. Keefer were the parties entitled or who might be entitled under the will or as heirs of George Keefer deceased to any

property here in question not devised to George, Peter and John Keefer. The fact of so many joining in that deed would indicate that those three were not the sole owners unless indeed the others were joined to remove doubt as to the extent of the devise to the three. What then was the lot thus conveyed? It is said to be on the north side of Mill street and north of the Keefer mill. According to the map and plans, that street does not extend west of the east side of the head-race nor as far north as the defendants' mill. Both Mill street and the Keefer mill are more than 20 feet south of the admitted boundary. We therefore must look elsewhere for a better description. But at this stage John G. Keefer owns the cotton factory lot, and George and Peter and John Keefer who owned the Keefer mill lot, have joined in the conveyance to him, and a water privilege belongs to it which implies that there was some arrangement for obtaining water from the head-race and that water had to be discharged. At that time and up till about 1870 according to the evidence the water from the cotton factory went into the tail-race. Indeed a plan, undated, annexed to the water lease for that building (then used as a cement mill) from the Crown to John Battle dated 11th February, 1880, shews that the water took that course, but that plan must have been prepared before that date and I may note that the delineation of the land seems manifestly erroneous explainable, perhaps, by Grenville's evidence that both mills were run for a time by one man as a cement factory.

On 24th November, 1862, John G. Keefer, by three separate deeds conveyed to John Keefer to Thomas C. Keefer and to Catherine Eastman one undivided third each in the cotton mill property. In each the description is "one undivided third of the lot and cotton mill thereon erected, north side Mill street on the north of the Keefer mill on the east side of the Welland Canal together with one-third of the water and all other privileges thereunto attached appertaining or belonging."

On July 21st and July 28th, 1865, John Keefer and Catherine Eastman respectively conveyed each his or her one-third to Thomas C. Keefer who thus became sole owner. And here for the first time we have the boundaries definitely stated thus: "Undivided one-third of an hydraulic lot on which is erected the Thorold cotton factory on the east side of the Welland Canal together with the undivided one-third

of all houses, outhouses and waters thereon erected and all appurtenances to said premises belonging to which said cotton factory and premises are bounded on the east by the rear of the lots on Front street on the west by the lands of the Welland Canal Company, on the north by the land commonly known as Christy's mill lot, and on the south by a line drawn from a point half way between the nearest part of the northern wall of Keefer mill and the southern wall of the said cotton factory through east and west to the eastern and western boundary of the said cotton factory and premises."

Here then, we find the line of the southern boundary declared to extend as the plaintiff claims through to the western boundary and John Keefer, one of the owners of the Keefer mill lot, is conveying the land north of that line and declaring that "the cotton factory and premises"—the hydraulic lot—are so bounded. At that time the south wall of the cotton factory of which part still remains was about 48 feet 2 inches north of the Keefer mill.

On 26th March, 1866, Thomas C. Keefer conveyed to Wm. W. Wait "the Thorold cotton factory lot bounded on the north by the Christy mill lot on the south by the Keefer mill lot, on the east by the mill-race, and on the west by the Board of Works line." From Wait the property passed by the latter description through several intermediate successive owners until in 1883 the plaintiff became sole owner. He has been operating the pulp mill thereon ever since.

After John Keefer had so drawn the boundary line we find him with George and Peter Keefer conveying to James Lawson and Wm. O. Cowan by deed dated 21st September, 1868, "the property known as the Keefer mill lot" bounded on the west by the Board of Works line, on the south by the land of John Brown, on the east by the mill-race and "on the north by a straight line drawn from said race to the Board of Works line and running midway between the north wall of the mill and the south wall of the main body of the building, north of the said mill and used as a cotton factory together with all the water privileges and right of water for the use of the said mill and for running the machinery of the said mill acquired by George Keefer deceased, from the Board of Works."

This is the only conveyance under which the defendants have any claim and clearly it only gives the land south of

the boundary contended for by the plaintiff, and as there is no suggestion of any possession adverse to the plaintiff north of that line the defendants' claim to the ownership of the tail-race is effectually disposed of.

Lawson remained interested in the property and ran the factory till 18 , and subsequently it passed through various successive ownerships till on April, 1910, it was conveyed to Herman M. Reiger who is said to hold for the defendant company. The conveyance to him states the north boundary line as going to the Board of Works line just as in the deed of 1868. The water privileges and rights are referred to as being those acquired by a previous mortgagee, the Quebec Bank, but a reference to the registrar's abstract does not shew that they assumed to exceed those acquired by Lawson and Cowan. So that H. M. Reiger and the defendant company on the face of the conveyance had direct notice of their boundary and limited rights.

Although it is extremely unlikely that the cotton factory was originally built exactly the same number of feet and inches distant from an established boundary line as the grist mill was, and, therefore, it is more than probable that the line half way between the two buildings was an arbitrary one, afterwards established, nevertheless it is clear that before either of these two properties left the Keefer family that boundary between them was definitely settled and known. Thomas C. Keefer through whom the plaintiff claims had a conveyance in 1865, of one-third with that expressed boundary from John Keefer through whom the defendants subsequently claim. If the plaintiff had only that one-third it would suffice to give him a right of action against the defendants who have no share at all. But Thos. C. Keefer also had title by the deed of 1862 to "a lot upon which a cotton factory has been erected," north of the Keefer mill and of Mill street, from Peter and George Keefer, and when Peter and George and John subsequently convey to Lawson and Cowan "the property known as the Keefer Mill lot," they expressly declare how that property so known is bounded. That conveyance makes a solemn admission by all parties to it though not an estoppel against them for the plaintiff. It is, I think, perfectly clear that the plaintiff's predecessor Wait acquired the title to all the land north of the straight line forming the boundary, and the defendants'

predecessor acquired none of it, but at the most an easement in the tail-race.

It is not shewn that any one connected with the Keefer mill has ever since exercised any acts of ownership over the tail-race north of the boundary or expended any money or labour upon it. On the contrary the plaintiff during his 25 years of ownership has deepened, widened, straightened, and walled it, beside considerable expenditure upon the head-race, which apparently would serve for the benefit of both properties.

I would therefore agree with the learned trial Judge that the land occupied by the tail-race north of the boundary line belongs to the plaintiff subject to whatever easement the defendants may be entitled to therein and consider that the appeal should be allowed in that respect.

Then as to the extent of the easement. It is unnecessary to consider what effect the conveyance by George, Peter, and John Keefer to John G. Keefer, had upon their right to send water over the land granted or released to him and thus derogate from their own conveyance. No doubt they intended to retain the right of discharging water to the full capacity of the existing mill. I do not see that it can be said they intended more. The will indeed only mentioned the water privilege as granted by the Board of Works—that was sufficient (in 1845) to work the mill and all the machinery. And when they conveyed to Lawson and Cowan, in 1868, they only specified “all the water privileges and right of water,” for the use of the mill and machinery, “acquired by George Keefer deceased from the Board of Works.” No doubt that might be intended as only a conveyance of the right to free water and to have no bearing upon the right to use and discharge whatever water they could acquire. But I am desiring to point out that there was no intimation in any of these documents of any intention to reserve more than the capacity at that time of the mill. And even if an implied reservation would be allowed to as great an extent as an implied grant it would go no further than such capacity. And neither they nor Lawson and Cowan nor those claiming under them would have any right to increase the burden. I see no ground whatever for implying tenancy in common or equal privileges in the tail-race. The utmost, I think, would be the right of reformation of the deeds of 1862 and 1865 to effectuate if necessary an implied reservation to the

extent mentioned or the circumstances would justify a presumption of a lost grant to them to the same extent.

Up till 1883, Lawson from 1868 used only about 70 horse-power for four run of stones and the machinery. That appears to have been the capacity of the mill. In 1883, he changed it to a roller mill, and put in different wheels and used about 100 horse-power. It does not follow that he used more water with the improved machinery. That seems to have been the only change, if it was one, as to quantity of water before Reiger or the defendants acquired the property in 1910, and began the manufacture of wood pulp. They applied to the Government for permission to take more water from the head-race. They and the canal authorities agreed to consider that George Keefer the testator had been entitled to water for a maximum of 100 horse-power, and they obtained a lease from the Crown which so recites (dated 19th April, 1910), of sufficient for 300 additional, making 400 horse power in all. But they put in new wheels and machinery of a capacity of over 600 horse-power and have since been using admittedly 400 horse-power and discharging the increased quantity of water into the tail-race and to provide for this greater quantity they enlarged the openings for intake and discharge. The 400 horse-power does not necessarily use four times as much water as Lawson did, for the defendants' wheels and machinery are more effective, but the discharge is undoubtedly much greater and has raised the water in the tail-race. It is hardly denied that thereby the free flow from the plaintiff's mill and the free working of his wheels has been interfered with to some extent.

Apart from any right under the conveyances the defendants also say there has been sufficient user to enable them under the Statute of Limitations to an easement for using the tail-race on the plaintiff's land. Lawson ran the mill continuously from 1868 to 1887. Apparently it had previously been used from 1862 to 1868. From 1887 till November, 1888, it was operated by one Spinks. Then from November, 1888, till June, 1890, during the ownership of one Clark, it was idle and no water running from it. In April, 1892, it was sold to one Fraser, who in 1893 mortgaged to the Quebec Bank, by whom it was conveyed in July, 1900, to one Dawson, whose executors joined in the conveyance of April, 1910, to H. M. Reiger. Between 1893 and 1900 the mill was shut down for several years and no water pass-

ing through. Again it is said, but not clearly proved to have been closed for several years and up to April, 1910, during the ownership of Dawson, who seems to have held for the Imperial Artistic Wood Turning Company.

It is evident that in 1888, there had been more than 20 years active enjoyment of the easement since either 1862 or 1866, and that would have been available as a defence by Spinks, if an action had then been brought against him. The intervals of non-user since 1888 have, in no sense, been interruptions by the plaintiff, but were owing no doubt to financial circumstances of the owners of the mill for the time being. Nor did they occur with any intention of extinguishment or abandonment of the easement. But the Limitations Act, 10 Edw. VII., ch. 34, sec. 36, requires that the full period of 20 years of actual enjoyment without interruption shall be the period next before the action which was begun in the autumn of 1910. It cannot be said that there has been enjoyment ever since 1890, for there were several years between 1893 and 1900, during which it is proved there was no enjoyment of the right. The defendants then cannot claim the benefit of the statute, though even if they could it would not increase the burden beyond the actual user which did not exceed 100 horse power. But they are still entitled to that extent under the old easement, which, as, I think, should be presumed. George, Peter, and John Keefer, by some agreement or grant were possessed of, and which has not been extinguished by mere non-user during the intervals referred to—but only modified by the dam and wall to be referred to.

With regard to the wall of the plaintiff, removed by the defendants, the facts appear to be these. Lawson, the owner of the defendants' mill, when putting in new wheels, about 1883, found it necessary to raise the water so as to cover them and prevent their burning out. He had put in some additional discharge tubes and constructed a curved wall to guide the water therefrom. That wall led from the mill to the east side of the tail-race at the boundary. To back up the water he constructed a rubble wall or dam on his own side at the boundary from the curved wall across the tail-race. The water then flowed over that rubble dam and fell into the tail-race on the plaintiff's side. Originally the water from the plaintiff's mill was discharged into the tail-race. When the plaintiff bought he found it not going into the tail-race

which emptied into the canal level of lot 23, but carried across and above the tail-race by a wooden flume, which ran directly west and emptied into the canal level of lock 24, which is higher than lock 23. This flume dated from 1820 or perhaps a little earlier according to the defendants' witness Grenville. In making his improvements about 1886, the plaintiff decided to dispense with the flume and run the water again into the tail-race and to deepen the latter so as to give more head. As the water would run into the tail-race close to the boundary line, there would be danger of undermining the rubble dam, which Lawson had built and also the banks. So he built a stone wall on his own side of the boundary and across the tail-race and in front of it a sloping apron or slide to receive the force of the water and let it flow off more freely, and he also built walls along the sides of the tail-race. The wall across it was lower than Lawson's rubble wall over which the water flowed upon and over it without interruption. This condition remained until the defendants came. They wished to increase their head of water from 17 or 18 feet to about 23 feet, and they were going to use a different sort of wheel, and they needed to let off the water at a lower level, and so they decided to remove the rubble dam or make an opening in it and they appear also to have deepened their tail-race. That would still leave the plaintiff's wall as an obstruction across the tail-race, and without consulting him they removed it, or at least, the upper part of it. Edward Foley, one of the defendant company, says their mill as now constructed could not be run with the wall there, and they would have to raise the wheels if the wall be restored. Foley was at one time the plaintiff's foreman and had in fact taken part in building the wall, and therefore knew it was the plaintiff's. The defendants seem to have acted in that matter inconsiderately. It must, I think, be taken that Lawson and his successors in title deliberately abandoned their right to discharge the water at the lower level below the top of the wall and assented to the plaintiff's right to maintain the wall in that position upon his own property. It had been there for 24 years before its removal. The defendants had no right to remove it. It is not very clear what would be the cost of replacing it, but \$50 would perhaps cover it.

Then as to the damages to the plaintiff's business already incurred. The water is higher in the tail-race by from 6

inches to 14 inches. That is, it varies as much as 8 inches above the 6 inches. Foley says it was usual for it to vary from 3 inches to 6 inches. Thus it would appear there is a permanent increase of 6 inches, and an increase of variation as well. The plaintiff attributes all the undoubted interference with the working of his mill, affecting not only quantity but quality of output, to this increase. But it is manifest from the evidence that there would be two causes of interference—one the lowering of water in the head-race and the other the raising of it in the tail-race. As already mentioned the defendants enlarged their intake opening and thus drew more water from the head-race. The effect of this is to lower the water at the intake of both mills. According to Mr. J. C. Gardner, C.E., whose evidence in this regard as modified on cross-examination is not disputed by any expert witness, this lowering of the water would account for the greater part of the plaintiff's loss of power. But the defendants are not liable for taking whatever the Government permit them to take out of the head-race as the plaintiff has no existing continuing lease or right to any specified quantity. He is apparently only obtaining water at sufferance, having laid out a good deal of money upon the head-race as well as the tail-race. For only a fraction of the loss in his output can he hold the defendants responsible by their interference with the tail-race. The learned trial Judge was not satisfied that any damage had been proved therefrom. The Divisional Court considered that \$250 would compensate him for the injury from September, 1910, to 9th December, 1911. Although holding the defendants to be the owner of the race they were assessing the full damage from increase of water. I cannot say their assessment should be disturbed for that period, but as, I think, the operation of the injunction against the defendants should be stayed till 1st July, 1912, I would assess the whole damage from September, 1910, up to that time at \$375, making with \$50 for the wall \$425 in all.

The defendants should be restrained from discharging into the tail-race more water than was sufficient for development of 100 horse-power with the wheels previously in the mill—but the injunction to be stayed till 1st July next, to enable them to make any necessary alterations.

Counsel for the plaintiff, I understood, to be willing to allow even 150 horse-power with improved machinery. If so that may be so modified.

The plaintiff should have an opportunity of rebuilding the wall and apron or either within two months after the 1st July next, doing so with all proper dispatch, and the defendants should be restrained from discharging water through the tail-race during the reconstruction so as to interfere therewith.

The plaintiff should be declared to be the owner of the tail-race subject to an easement in the defendants to discharge waters from the mill at the former height of the plaintiff's wall, not exceeding the quantity already mentioned.

The defendants should pay the damages and all costs, including those of this appeal.

It is to be hoped that in any event the parties with the aid, perhaps of the canal authorities, who seem to have control of the situation, will be able to come to some sensible business arrangement, which will not retard enterprise.

COURT OF APPEAL.

MARCH 19TH, 1912.

BULLEN v. WILKINSON.

3 O. W. N.

Vendor and Purchaser—Contract for Sale of Land—Misdescription—Innocent Mistake as to Frontage of City Lot—"About" and "More or Less"—Purchase Price not Fixed per Foot—Specific Performance—Knowledge of Purchaser—Question of Title and Conveyance.

SUTHERLAND, J. (19 O. W. R. 408, 2 O. W. N. 1202), dismissed with costs plaintiff's action to enforce specific performance of an agreement for sale of No. 44 Maitland street, Toronto, for \$4,000 and for an abatement of price for four feet six inches frontage, being part of a lane over which the defendant had only a right of way.

DIVISIONAL COURT *held*, 20 O. W. R. 346, 3 O. W. N. 229, that in view of the position taken by defendant in treating the case as one in which she could not make title to the additional four feet odd, and to her instructing her solicitor to return the deposit, that deposit should now be returned to plaintiff, and in default of such return the same should be allowed as payment *pro tanto* on the costs of this action and appeal. Appeal dismissed with costs subject to the above.

COURT OF APPEAL dismissed the plaintiff's appeal with costs.

An appeal by the plaintiff from a judgment of Divisional Court, 20 O. W. R. 346, dismissing his appeal from a judgment of HON. MR. JUSTICE SUTHERLAND, 19 O. W. R. 408.

The appeal to Court of Appeal was heard by HON. SIR CHARLES MOSS, C.J.O., HON. MR. JUSTICE GARROW, HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MEREDITH, and HON. MR. JUSTICE MAGEE.

W. J. Elliott, for the plaintiff, appellant.

W. E. Raney, K.C., for the defendant, respondent.

Their Lordships' judgment was delivered by

HON. MR. JUSTICE MEREDITH:—The plaintiff is seeking equitable relief; for, in addition to specific performance of a contract for the sale to him of land, he is insisting upon compensation for a deficiency in the quantity which, he asserts, was sold to him, so that, in a sense, the Court has a discretion, which it may rightly exercise, to refuse the relief sought, leaving him to pursue his rights at law, if any he has.

In one of the cases very much relied upon by Mr. Elliott—*Mortlock v. Butler*, 10 Ves. 292—the Lord Chancellor, dealing with the question involved in this case, said: "For the purpose of this jurisdiction, the person contracting under those circumstances is bound by the assertion of his contract, and, if the vendee chooses to take as much as he can have, he has a right to that, and to an abatement; and the Court will not hear the objection, by the vendor, that the purchaser cannot have the whole. But that always turns upon this; that it is, and is intended to be, the contract of the vendor."

There is little, if any, doubt about the facts of the case. The land in question adjoins lands of the plaintiff upon which he has built an "apartment house," and upon which he has resided for some time; and he is a builder by trade; and quite familiar with the land in question, having had, at one time, the use of part of it.

His contention is, that the defendant agreed to sell to him land having a frontage of $24\frac{1}{2}$ feet for \$4,000, and that she is able to convey to him only 20 feet, and that there should be performance of the contract with a proportionate diminution in price.

The contract in writing is to sell the premises known as No. 44, having a frontage of 24.6 feet more or less. The "premises" are residential property the frontage of which is 20 feet, with a right of way over an additional adjoining

8 feet; and the residential building covers the whole 20 feet frontage.

That the plaintiff knew that the whole frontage over which the defendant had ownership rights was not absolutely hers, that she had a right of way only over part of it, is made very plain; that the plaintiff was more than once made aware of the fact is well proved, and indeed is admitted by him; it would be exceedingly improbable that he would not have become aware of it, if he had not been told. So too would it be that he did not know pretty nearly the frontage of the building: he admits that he thought it was between 19 and 20 feet and that the way was "about 9 feet, between 9 and 10 feet."

Some time before buying, he had gone to a land agent, through whom some earlier transactions respecting the land had taken place, and sought from him information as to the property with a view to buying, when, having no better means at hand, of finding its dimensions, the land agent shewed him the dimensions as given in "an old assessment," and at the same time told him "that he was not sure whether the plaintiff owned the land or half of it, or had a right of way over it."

The plaintiff and the other land agent, through whom the sale was made, differ as to the manner in which the dimensions of the frontage came to be set out in the agreement. The plaintiff testified that there was no particular discussion on the subject, and that the land agent put them down. The land agent testified that the plaintiff said he wanted to know the frontage and said he would not buy unless he knew what he was buying, and so they were inserted. He says this took place at the time the agreement was signed, which seems to be inconsistent with other parts of his testimony as to when, how, and why he obtained from the defendant the dimensions, but that is not very material except as shewing that care must be taken in accepting everything as a fact that is sworn to, because of memory's defects, to which all are more or less subject.

It was, doubtless, better for the plaintiff to assert that it was not upon his insistence that 24 feet and 6 inches frontage was inserted in the agreement without mentioning in any way the way or any rights over it, for that might look like getting the defendant into a trap to agree to sell more than she had, when it is manifest that she was really

only agreeing to sell that which she actually had, and which they both knew she had and occupied and used: which fact doubtless accounts for the careless way in which the dimensions were obtained, from the municipal assessor's returns only, when accuracy might so easily have been attained.

Whether in strictness an agreement to sell premises known as street number 44, having a frontage of 24 feet 6 inches more or less would ordinarily bind the seller to convey at least 24 feet, need not be considered, because there is a good deal more in the case than that; there is the knowledge of the plaintiff that part of the defendant's right comprised a common way, and that No. 44 comprised only 20 feet in addition to the right of way, and that that was what she was selling; and, in addition to that, there is no evidence that the 20 feet, with the right of way, is not worth quite as much as 24 feet without any such right, and, if it be, there is no right to compensation.

I am, therefore, of opinion that this is not a case in which the plaintiff is entitled to a judgment such as he seeks in this action, and that, therefore, the dismissal of it should not be disturbed. Nor can I think that he is entitled now entirely to change his position and demand specific performance, a thing which he might have had, but would not; it may be that if, in this action, he had claimed such relief in the event of failing to get the greater—in the alternative—he might have it; but as it is, and under all the circumstances, it should, I think, now be refused. In a sale of residential property, promptitude is generally essential.

I would dismiss the appeal.

COURT OF APPEAL.

MARCH 20TH, 1912.

NELLES v. HESSELTINE.

3 O. W. N.

Appeal—To Supreme Court of Canada—From Court of Appeal—Application for Leave—Non-appealable Case—Supreme Court Act, s. 71.

Moss, C.J.O., *held*, that leave to appeal from a judgment of Court of Appeal (11 O. W. R. 1062), could not be granted by a Judge of the Court of Appeal under s. 71 of Supreme Court Act, as that section confers no power to grant leave to appeal in a non-appealable case or for taking any other step in the matter.

SUPREME COURT OF CANADA previously refused leave to appeal. See 21 O. W. R. 201.

An application on behalf of the defendants The Windsor, Essex and Lake Shore Rapid Railway Company for an order allowing in terms of section 71 of the Supreme Court Act, an appeal from a judgment pronounced by this Court in this action on the 21st of April, 1908, reported 11 O. W. R. 1062.

M. Wilson, K.C., and A. H. F. Lefroy, K.C., for the defendants' motion.

C. J. Holman, K.C., for the plaintiff, contra.

HON. SIR CHAS. MOSS, C.J.O.:—Several directions were asked for in the notice of the application but it is quite apparent that the only matter which I can entertain is that made under sec. 71. The other matters could only be dealt with by the Supreme Court or a Judge of that Court.

I have read the numerous affidavits and other papers forming the material on which the motion is supported and opposed including the opinions of the Registrar of the Supreme Court upon the motion heretofore made on behalf of the applicants to affirm the jurisdiction of the Supreme Court to entertain an appeal from the judgment in question and of Mr. Justice Idington speaking for the Supreme Court in affirming the Registrar, reported 21 O. W. R. 201.

I am fully sensible of the unfortunate situation which the applicants seem to occupy at present of not having ever had an opportunity afforded them of appealing from the judgment in question to the Supreme Court owing to the form of the judgment and the view taken by the Supreme Court as to its jurisdiction to entertain an appeal in such a case. Upon the application to the Registrar of that Court to affirm jurisdiction he expressly held that there was no jurisdiction because the appeal had not been brought within 60 days and determined nothing as to the point of the judgment not being a final judgment. But it is impossible not to see from the references to the cases of *Clark v. Goodall*, 44 S. C. R. 284, and *Crown Life v. Skinner*, 44 S. C. R. 616, what the opinion of the Court was on the point.

Besides the chief ground upon which the applicants rest their present application and excuse their delay is that the judgment not being final, judgment was not appealable to the Supreme Court upon or after its being pronounced by this Court.

And in view of the several decisions on the point found in the Supreme Court reports which I have again read and considered it does not seem open to question that the judgment of the 21st of April, 1908, falls within the prescribed category of non-final and therefore non appealable judgments.

The result is that as I have said the applicants have been placed in an unfortunate position seemingly without any special fault on their part. On the other hand the plaintiffs are equally blameless and undoubtedly upon the faith of the judgment have incurred large expense in and about the conduct of a reference which on the applicants' contention was based on an erroneous view of their liability.

The difficulty and I think an insuperable one that I find in the way of relief upon this application is that the case is not one to which sec. 71 applies and that I am without power to do what is asked. That section only enables a Judge of the Court appealed from to allow an appeal under special circumstances although it was not brought within the prescribed time which if this were an appealable case would be within 60 days. The expression "allow an appeal" has been interpreted as meaning only that a Judge may settle the case and approve the security: per Strong, J., in *Vaughan v. Richardson*, 17 S. C. R. 703. See also *News Printing Co. v. Macrae*, 26 S. C. R. 691 at 701.

But as the context shews the "appeal" to be allowed and the case to be settled and the security to be approved plainly refer to an appealable case, one that but for the lapse of time could have been appealed to the Supreme Court as of course. The single power given to the Court or Judge appealed from is to remove in such a case the difficulty occasioned by the failure to carry an appeal to the Supreme Court within the prescribed time. It confers no power to grant leave to appeal in a non-appealable case or for taking any other step in the matter.

I am unable, therefore, to see my way to making any order or to giving any direction as to security or otherwise as asked.

The motion must be dismissed and the plaintiffs are entitled to their costs.

COURT OF APPEAL.

MARCH 19TH, 1912.

REX v. GORDON S. WRIGHT.

3 O. W. N. ; O. L. R. ; Can. Cr. Cas.

Criminal Law—Canada Shipping Act—Fraudulent Use of Certificate of Service—To Obtain Certificate of Competency—Crown Case Reserved—Acquittal Sustained by Court of Appeal.

Defendant was acquitted on a charge of having on March 12th, 1910, at the city of Windsor, fraudulently made use of a certificate of service to which he was not justly entitled, contrary to the Canada Shipping Act, and that at the time and place aforesaid he did make a false representation for the purpose of obtaining for himself a certificate of competency, contrary to the Canada Shipping Act, but at the solicitation of the Crown, Judge Winchester granted a reserved case on the questions: (1) Was I right in holding that the use made by defendant of the document was not an offence under the first count? (2) Upon the evidence, was I right in law in holding that the defendant did not make such a false representation as to constitute an offence under the second count?

COURT OF APPEAL answered both questions in favour of the defendant and sustained the acquittal.

Case stated by HIS HONOUR JUDGE WINCHESTER, Senior Judge of York county, for the opinion of the Court of Appeal.

The defendant was committed for trial by the Police Magistrate of Toronto upon charges preferred against him in the Police Court, and being in close custody duly elected to be tried by a Judge without a jury pursuant to the provisions of the Criminal Code in that behalf.

He was thereupon tried by HIS HONOUR JUDGE WINCHESTER, Senior Judge of the county of York presiding in the County Court Judges Criminal Court, upon a charge sheet containing two counts; first, that he fraudulently made use of a certificate of service to which he was not justly entitled contrary to the Canada Shipping Act R. S. C. (1906), ch. 113, and secondly, that he made a false representation for the purpose of obtaining for himself a certificate of competency contrary to the Canada Shipping Act. The date of the commission of the alleged offences was stated to have been the 12th of March, 1910.

The learned Judge found the defendant not guilty of either of the offences charged, but, at the request of the Crown counsel, stated a case under the provisions of the

Criminal Code in that behalf reserving two questions, viz.:

"1st. Upon the evidence was I right in holding that the use made by the defendant of the document which he presented to the examiner of masters and mates at Windsor was not an offence under the first count above set out?

2nd. Upon the evidence was I right in law in holding that the defendant did not make such a false representation as to constitute an offence under the second count above set out?"

These charges were laid under section 123 of the Canada Shipping Act, the first charge having relation to sub-head (d) and the second to sub-head (a). The effect of these is to declare guilty of an indictable offence any person who—(a) makes, procures to be made or assists in making any false representation for the purpose of obtaining for himself or for any other person any certificate of competency or of service or, (d) fraudulently makes use of any such certificate which is forged, altered, cancelled or suspended or to which he is not justly entitled.

The case before the Court of Appeal was heard by HON. SIR CHAS. MOSS, C.J.O., HON. MR. JUSTICE GARROW, HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MEREDITH and HON. MR. JUSTICE MAGEE.

J. Jennings and H. C. Macdonald, for the Crown.

H. H. Dewart, K.C., for the defendant.

HON. SIR CHAS. MOSS, C.J.O.:—It would have been more convenient if the order in which the counts are set out in the charge sheet had been reversed so as to correspond with the order of the sub-heads of section 123 under which they are framed. And inasmuch as the second count charges a violation of the provisions of sub-head (a) it is convenient to consider it first and to deal with the first count last.

The defendant, a sailor on the inland waters of Canada and the holder of a certificate of competency to act as mate on a ship trading on the inland waters of Canada, made application to Mr. W. F. McGregor the Official Examiner at Windsor for the Department of Marine & Fisheries, to be examined for a certificate of competency as master of a passenger steamer on inland waters. A printed form of application issued by the department was furnished him by

the examiner who filled in some of the particulars. The defendant filled in the remainder, signed it and returned it to the examiner on the 12th of March, 1910.

Accompanying the application were three other documents (a) a certificate of discharge for seamen according to Form "K." in the schedule to the act signed by the master of the steamer "Iroquois" stating among other particulars the following:—

Capacity.	Date of Entry.	Date of Discharge.
First Mate.	April 25th, 1908.	December 8th, 1908

(b) A testimonial dated December 9th, 1909, signed by the master of the "S.S. W. D. Matthews," stating that the defendant was second mate on the "W. D. Matthews" from April 26th to August 14th, and first mate from August 15th to December 9th, 1909; (c) a testimonial dated March 8th, 1910, signed by the master of "S.S. Stormont" stating that he knew the defendant for the past few years as 2nd mate of the steamer "Algonquin" and as mate of "Iroquois" and "Matthews." All these documents give him a good character for ability, conduct, sobriety, trustworthiness and competence. In setting out in the application the particulars of testimonials of service he gave the following:

Ship's Name.	Rank.	Date of Commencement.	Date of Termination.	Time in such Ship.
1. Iroquois.	Mate.	April 25/08.	Dec. 8/08.	7 mos. 13 days.
2. W. D. Matthews.	2nd Mate.	April 26/09.	Aug. 14/09.	8 mos. 18 days.
3. " "	Mate.	Aug. 15/09.	Dec. 9/09.	8 mos. 24 days.

The defendant was duly examined by the examiner as required by the Shipping Act and obtained a certificate of competence as a master. The charge against him on the second count is that in the application and papers produced by him he made a false representation for the purpose of obtaining the certificate. The gravamen of the charge is that he represented that he had served as mate for a year when in fact he had not served for that length of time, and that he made the representation knowing it to be false and for the purpose of deceiving the department into granting him a certificate of competency. The learned Judge who heard the testimony of the witnesses including that of the examiner and of the defendant, completely exonerated the latter from the charge of fraudulently or knowingly making

any false representations and upon the whole evidence he was justified in coming to that conclusion. There is no doubt that in one sense the statement in the certificate of discharge as to the capacity on which the defendant served on the "Iroquois" is not strictly correct. It represents the defendant as serving as first mate during the whole season of 1908 whereas during the greater portion of the time he was serving in the capacity of second mate. But at the time the discharge was given and for some time before, he was the first mate of the "Iroquois." According to a literal construction of the Shipping Act only one officer known as a mate is recognised on inland vessels. But as the evidence shews and the learned Judge found, in actual practice there are officers serving under and next to mates who are called second mates or probably in the passenger steamers second officers as distinguished from mates or first officers. These persons not infrequently perform the duties or some of the duties of the mate or first officer. This appears to have been recognised by the examiner who testified that if the certificate had shewn the period of service on the "Iroquois" to be partly as first mate and partly as second mate but covering the period stated, he would have accepted it. It is to be borne in mind also that before shipping on the "Iroquois" for the season of 1908 the defendant had obtained and was the holder of a certificate of competence as mate so that during that season he was actually qualified to perform and to a considerable extent throughout the season did perform the duties of a mate. The defendant who seems to have given his testimony in a fair and straightforward manner swore that the certificate of discharge was drawn up, signed and handed to him by the master of the Iroquois without any request or suggestion as to its contents, that when he read it he saw it was incorrect because he was not first mate all the time but he did not know that there was only one person recognised under the law in Canada on the inland waters as mate, in other words none but first mate and that he considered that second mates' service under a certificate of competency as mate counted. In this view he appears to be supported by the examiner.

Upon all the facts the learned Judge found that the defendant was not guilty of falsely intending to misrepresent the facts and that there was no intent on his part to

make use of the certificate of discharge as a false representation.

It is of course a matter of public importance and concern that there should be no evasion of the provisions of the Shipping Act in regard to any of its particulars and especially so in regard to the competency and skill of those to whom this safety of lives and property are entrusted and that where wilful fraud and misrepresentation are proved to have been practised, punishment should follow.

But where, as here, even the examiner to whose judgment the question of proper service was committed by the department was unable to see any infraction of the law in what was done in this case it could hardly be expected that the learned Judge would decide otherwise than he did.

The second question should therefore be answered in the affirmative.

The first question is readily answered. The first count charges the defendant with fraudulently making use of a certificate of service to which he was not justly entitled, and is laid under sub-head (d) of section 123. The certificate there referred to is plainly either the certificate of competency or of service referred to in sub-head (a).

The certificate of discharge under sec. 176 form K. is an entirely different document from the certificate of service referred to in sub-head (a) of sec. 123.

The certificate of competency there spoken of is plainly the document provided for by secs. 82-84 inclusive and the connection renders it equally plain that the certificate of service spoken of is the document provided for by sections 85-91 inclusive.

It is against fraudulent use of "such certificate" that sub-head (d) is directed. The production to the examiner of the certificate of discharge was therefore no offence against this provision of the Shipping Act and there was no proof of the first count in the charge sheet.

The first question should also be answered in the affirmative.

HON. MR. JUSTICE MACLAREN:—I agree.

HON. MR. JUSTICE MEREDITH:—Among things manifest in this case are these: that the defendant obtained a master's

certificate to which he was not entitled, and that he obtained it upon untrue statements in writing given by him for the purpose of obtaining such a certificate.

According to the evidence, and as it is admitted on all hands, service, by an applicant for a master's certificate, on inland waters, as mate for twelve months is a necessary qualification.

The defendant had never so served except for a period of about five months.

In one of his application papers—the principal one—in the proper column he set out his services as follows:—

Mate April 25/08 to December 8/08;
2nd. “ “ 26/09 to August 14/09; and
“ Aug. 4/09 to December 9/09.

The first of these statements was untrue, and of course untrue to his knowledge; the truth was, that in this period he had served as mate for only about six weeks and as second mate for the rest of the time.

In his certificate of discharge in respect of that service he is described as first mate and his date of entry and date of discharge are said to have been April 25th, 1908, and December 8th, 1908; in truth he had been mate for only about six weeks between those dates; the rest of the time he had been only second mate.

Notwithstanding a misplaced attempt on the part of counsel for him to prevent it, the defendant very fully admitted that he knew this was wrong and yet he used it as evidence of his service as mate in his application for his master's certificate, which application but for such false statement, together with the others I have mentioned, would never have been granted. These are his words in making that admission:—

“ Q. Now, in regard to this certificate shewing the time that you served on the ‘Iroquois,’ the length of service on that boat, how was it that that did not have anything in there about second mate? A. I cannot say as to that; Captain Stinson wrote that out.

“ Q. Did you request him not to make any reference to second mate? A. No, I did not say anything about it.

“ Q. Of course you knew the moment you got it and saw it it was incorrect? A. I may have.

“ Q. Did not you?

Mr. Dewart: We do not admit it is incorrect now.

Mr. Monahan: Kindly do not assist him.

Mr. Monahan: Q. You knew when you saw it that it was incorrect; you knew the moment you read it that it was incorrect, did not you? A. Why certainly, I was not first mate all the time."

No such officer as a second mate is known to the law contained in the Canada Shipping Act in inland waters; the officer commonly known as second mate in vessels in such waters is not; and does not perform the same duties as, a mate; service as second mate does not qualify for master; and it seems to me to be very little better than a pretence to assert that it does.

But, in order to convict, it was necessary to find that the false statements made by the defendant were made fraudulently; and in that he found a loop-hole of escape. A local examiner of applicants testified, in a very unsatisfactory manner, that he thought service as second mate counted; in regard to that it is fair to say that, if the man really believed it, he was an incompetent officer, whilst if untrue he was unfit for any public office; and in either case the public interests required better men. The defendant himself testified previously that he believed such service to be sufficient, a thing hard to make tally with his written statement shewing service as mate for over eleven months and as second mate for a shorter period; making, himself, a distinction between the two officers, as anyone at all familiar with their respective duties would. But this was a question of fact, from a finding upon which there is no appeal.

As the public interests require competent masters of vessel, and as life and property are often dependent upon their fitness for the office, it is to be hoped that such laxity in local examinations as this case discloses is of very infrequent occurrence; and that when discovered there is no delay in applying the proper correction.

But the defendant, by reason of the finding of fact exculpating him from a guilty knowledge of the wrong which he perpetrated, must go free of the criminal law, however he may fare elsewhere.

HON. MR. JUSTICE MAGEE:—I fully agree that the questions should both be answered in the affirmative, and for the reasons given, but I may also say that I have been unable

to find anything in the Canada Shipping Act, or the Regulation thereunder, to indicate that for the purpose of obtaining a certificate of competency as master for inland water service in the capacity of second mate by a person having a certificate of competency as mate is not as effective as service in the capacity of first mate. It is well known that vessels on our inland waters have first and second mates, and as put by the learned trial Judge: "They all use first and second mates to cover the word mate. One mate gets more money and does possibly a little more work and has greater responsibilities than the other, but they do pretty much the same work at times. At times they do exactly the same work and get their qualifications in that way."

For inland waters there is only the one grade of competency for the position of mate.

For sea-going ships the Act does not require the same qualifications for second mates as for first mates, and by sec. 82 the Minister may grant the certificate of competency to act "as master or as first or second mate of a sea-going ship, or as master or mate of a ship trading on the inland waters." But this lower grade of certificate is not permitted for the inland waters. There, if a man has a certificate of competency as mate it shews that he is fitted to be mate of any grade, first or second. Under the regulations, he must be 19 years of age, whereas a second mate of a sea-going vessel need only be 17 years old, and a first mate 19 years. A certificate of competency as master of a sea-going ship can be obtained without service as first mate at all, on $2\frac{1}{2}$ years service as second mate, if during the last 12 months "a first mate's certificate" of competency was held. O. C. 12/6/89 Dept. Marine ch. 78, sec. 20. The terms of service required for inland waters are in all cases less than for the sea. Under the Regulations a master for inland waters must have been at sea or on inland waters at least three years "one of which he must have been as mate and with a mate's certificate." O. C. 1889, sec. 68. I do not see anything to indicate that the regulations were intended to ignore the existence of the well-known fact that on inland waters all mates were not first mates, and that there were two grades, or to require that a lake captain must have served as first mate when a sea captain need not. That the word "mate" in the regulations includes second mates is, I think, manifest from Rule 46, among the Rules for estimating ser-

vice. Thereby "Service as apprentice seaman, boatswain, wheelsman, mate, or master will be accepted as qualifying for examination." By Rule 52: "Mate's service to be recognized as such must . . . be performed with the requisite mate's certificate." This ensures the equal competency of both first and second mates, if they wish to become master.

At all events this defendant should not be convicted for holding the same view as the examiner took, and the chief examiner apparently took, especially when a contrary intention on the part of the department whose certificate was granted to him is difficult to be assured of.

MASTER IN CHAMBERS.

MARCH 19TH, 1912.

MEYER v. CLARKE.

Discovery—Action for Libel—Defence Qualified Privilege—Refusal of Defendant to Answer Questions—Motion by Plaintiff for Order Requiring Reattendance.

MASTER IN CHAMBERS held that the questions asked should be answered, as they tend to prove malice in law and displace the ground of privilege. Defendant should attend again at his own expense and make answers to these questions. Costs of motion to plaintiff in any event.

Action for libel. Defendant justified and pleaded qualified privilege. Defendant was asked some questions he refused to answer. Motion was then made by the plaintiff for an order requiring him to reattend and answer the same.

T. N. Phelan, for the motion.

J. A. Macintosh, contra. \

CARTWRIGHT, K.C., MASTER:—The defendant pleads justification and also qualified privilege. Some of the questions were objected to at the time as tending to criminate the defendant. See questions 167, 168. This ground was abandoned on the argument. Others which were objected to were as to whether defendant had written other similar letters or made similar statements respecting the plaintiff to other persons. These I think should be answered as they tend to prove "malice in law," and displace the ground of privilege. See questions 246, 247, 249. See Odgers on Libel, 8th Eng. ed., pp. 348, 390.

The defendant should attend again at his own expense and make answers to these questions.

Costs of the motion will be to plaintiff in any event.

DIVISIONAL COURT.

MARCH 19TH, 1912.

EVANS v. RAILWAY PASSENGER ASSURANCE CO.

3 O. W. N.

Insurance—Accident—Action to Recover on—Notice not Given as Required—Fatal Effect on Right of Action.

A policy of accident insurance contained the following clause:—
“No claim shall be valid unless written notice of the happening of an injury or event which may give rise to a claim, or of any illness or disease, is given to the head office of the company in Toronto within 10 days from the date of the happening thereof.” Plaintiff was taken ill with appendicitis. Verbal and written notice was given to the local manager at Belleville within the time required, but written notice failed to reach the head office within the time required.

DIVISIONAL COURT *held* that this was fatal to plaintiff's right of action.

Gamble v. Accident Assce. Co., I. R. 4 C. L. 204, followed.

An appeal by the plaintiff from a judgment of the Senior Judge of the County of Hastings, pronounced at the trial, 12th December, 1911.

Action was brought under a policy of insurance claiming \$600, for disablement arising from an attack of appendicitis and continuing for 12 weeks from the 24th November, 1909, to the 16th February, 1910.

The defendants plead that disablement from appendicitis was not within the policy and further contend that the required ten days' notice in writing was not given by the plaintiff for the neglect of which he is barred.

At the trial the action was dismissed with costs, and plaintiff appealed.

The appeal to Divisional Court was heard by HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B., HON. MR. JUSTICE CLUTE, and HON. MR. JUSTICE SUTHERLAND.

M. Wright, for the plaintiff, appellant.

Shirley Denison, K.C., for the defendants, respondents.

Their Lordships' judgment was delivered by

HON. MR. JUSTICE CLUTE:—Dealing with the last objection first, the policy, clause 11, declares that “no claim

shall be valid unless written notice of the happening of an injury or event which may give rise to a claim, or of any illness or disease, is given to the head office of the company in Toronto, within ten days from the date of the happening thereof."

Verbal notice was given to the local manager within ten days from the 24th of November, the date of disablement. A letter was written to the local manager at Belleville, on the 27th of January, 1910, but written notice to the head office was not given until the 4th of February, 1910.

Mr. Wright urged that the event meant the disablement and its termination, and that, therefore, the plaintiff was entitled to ten days after he had left the hospital, which did not occur until the 16th of February. The plaintiff was wholly unfit for business for a number of days after he entered the hospital, but this affords no excuse. The giving of the notice under the terms of the policy was, in my opinion, a condition precedent to the plaintiff's right to recover, and not having been given it is fatal to the plaintiff's right of action.

It was argued that even if this should be so there was a waiver inasmuch as blanks for the proof of claim were sent on, filled out and returned to the company, but the proof of claim itself contains this clause "by furnishing this blank and investigating the claim the company shall not be held to admit the validity thereof or waive the breach of any condition of the policy." This clause is a sufficient answer to the alleged waiver.

In *Gamble v. Accident Assurance Company*, I. R. 4 C. L. 204, the provision of the policy there made it a condition precedent to the right to recover that a notice should be delivered at the chief office of the company in London within seven days after the occurrence of the accident, and it was held to apply to a case where, owing to the sudden character of the accident, and its resulting in instantaneous death, there was nobody capable of giving the required notice. The terms of the policy in that case were such as to negative any presumption bringing it within the class of cases in which it has been held that there was that which involved the implied condition that the destruction of the person or thing with which the contract dealt should absolve from its performance. It was argued in that case that the condition was unreasonable. Pigot, C.B., who delivered the judgment of

the Court, said, "Even if it were it would still be binding if its meaning were clear."

Taking the view I do that the effect of the want of notice required by the policy is fatal to the plaintiff's right of action, it is unnecessary to deal with the other defence.

It may be a matter for the Legislature to consider whether in accident policies there should not be statutory conditions imposed or the right of the Court to declare whether the conditions imposed are reasonable under all the circumstances.

The appeal should be dismissed, but I do not think it is a case for costs. See *Atkinson v. Dominion of Canada Guarantee and Accident Co.*, 16 O. L. R. 632.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B., and
HON. MR. JUSTICE SUTHERLAND:—We agree.

DIVISIONAL COURT.

MARCH 15TH, 1912.

ABREY v. VICTORIA PRINTING CO. AND OTHERS.

3 O. W. N.

*Company—Shares—Subscription—Action to Rescind Subscription—
Grounds—Misrepresentation—Executed Contract—Costs.*

DIVISIONAL COURT *held* that misrepresentation is no ground for setting aside an executed contract unless there is fraud or misrepresentation amounting to fraud.

Angel v. Jay, [1911] 1 K. B. 666, followed.

An appeal by the defendant company from a judgment of the HON. SIR WM. MULOCK, C.J.Ex.D., pronounced 20th December, 1911.

The action was brought against the company for the purpose of rescinding a subscription for stock and to recover back the \$2,000 paid therefor, and as against the individual defendants for damages for misrepresentation; the misrepresentations charged being certain statements which induced the subscription for the stock in question.

HON. SIR WM. MULOCK, C.J.Ex.D., at the trial, dismissed the action as against the individual defendants, be-

cause the representations were not made fraudulently, but innocently. However His Lordship set aside the subscription for stock and ordered a refund of the \$2,000 by the company; holding that the plaintiff was entitled to this relief because the representations, although innocently made, were material.

The appeal to Divisional Court was heard by HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B., HON. MR. JUSTICE BRITTON, and HON. MR. JUSTICE MIDDLETON.

J. Jennings, for the plaintiff.

S. H. Bradford, K.C., for the Victoria Printing Co.

HON. MR. JUSTICE MIDDLETON:—We cannot agree with the learned trial Judge. It is now settled by a series of cases—of which *Angel v. Jay*, [1911] 1 K. B. 666, is the latest—that “misrepresentation is no ground for setting aside an executed contract, unless such misrepresentation would be not only sufficient to afford ground in equity for rescission of an executory contract, but also is deceitful in contemplation of a Court of law; or, as Lord Selborne stated it, ‘unless there is a fraud or misrepresentation amounting to fraud.’”

Mr. Jennings attempted to support the judgment by inviting us to consider the evidence and upon it to find that there was in this case a fraudulent misrepresentation. We have read the evidence with care, and think the case comes perilously near to the line; but we cannot see our way clear to interfere with the finding of the learned trial Judge.

The appeal must, therefore, be allowed; but we think that the reasons which induced the trial Judge to deprive the individual defendants of costs justify us in depriving the company of the costs of either the action or appeal.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B., and HON. MR. JUSTICE BRITTON:—We agree.

HON. MR. JUSTICE MIDDLETON.

MARCH 15TH, 1912.

RE GALBREATH.

3 O. W. N.

Will—Construction—Originating Notice—Hypothetical Questions.

MIDDLETON, J., *held* that it was against the policy of the Court to attempt to answer hypothetical questions based upon conditions which may never arise.

An originating notice by the executors under Con. Rule 938, for an order determining a number of questions upon the will of the late General Brock Galbreath.

H. Carpenter, for the executors and for Frank (or Joseph Franklin) Galbreath, and his wife Violet.

W. M. McClement, for Jessie Elizabeth Townsend.

J. R. Meredith, for the infants.

HON. MR. JUSTICE MIDDLETON:—Upon the argument I pointed out to the counsel that most of the questions asked were questions which could not properly be propounded at this stage, either upon an originating notice or in an action, because the information sought related to the devolution of the estate in events which had not yet happened, and that it was against the policy of the Court to attempt to answer hypothetical questions based upon conditions which may never arise. To rule otherwise might give rise to idle litigation, and the incurring of much useless expense, particularly if the decision gave rise to a series of appeals.

Finally the parties agreed that the only question that could now be advantageously dealt with was the one relating to the legacy of \$150; the question being whether the intention of the testator was to give one sum of \$150 or to give an annuity of \$150, and if so, for how long.

As I read the will, the testator has given an annuity of \$150, payable on the first day of October in each year after his death until the homestead property is sold; which I interpret to mean until an actual sale of the homestead property is made by the executors, if by reason of Frank's death the right in the executors to sell arises, or the expiry of 15 years from the date of the will, when Frank himself, if then living, is entitled to sell. I think the fifteen years is the

extreme limit; but if by reason of Frank's death the property is sold earlier the right to the legacy then ends, and the annuitant will instead thereof receive the pecuniary legacy given in the earlier part of the will.

The costs of all parties may be paid out of the estate.

HON. SIR G. FALCONBRIDGE, C.J.K.B. MARCH 18TH, 1912.

JARRETT v. CAMPBELL.

3 O. W. N.

*Trial — Jury — Action on Question of Testamentary Capacity—
Witnesses—Motion for Jury.*

FALCONBRIDGE, C.J.K.B., *held* that an action on the question of testamentary capacity, where the trial would likely last two weeks and over 100 hundred witnesses would be called, many of whom would be expert, should be tried by a Judge without a jury as the circumstances would be such as to make it unlikely that the mind of the jury could be concentrated upon the real issue.

Motion by the defendant Campbell for an order that the issues be tried by a jury. The action concerned the validity of the will of the late Charles Bugg.

The plaintiffs, the executors named in it, propounded it for probate in the Surrogate Court of the County of York. The defendant Campbell, the only surviving child and heir-at-law of the deceased, contested probate, upon the ground that the will was not duly executed, and that the testator had not testamentary capacity; also upon the ground that the execution of the will was obtained by undue influence of the plaintiffs, who were not only executrices but residuary legatees under the will, and who beneficially took the greater portion of the testator's estate, which was very large.

The proceedings were transferred from the Surrogate Court to the High Court, and the order of transfer reserved to any party the right to apply for a trial with a jury.

R. McKay, K.C., for the defendant, E. B. Campbell.

E. C. Cattnach, for the plaintiff.

J. R. Meredith, for the infants.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—In *Re Lewis*, 11 P. R. 108, Ferguson, J., determined that a

probate action, transferred from the Surrogate Court to the High Court, was a matter over which the Court of Chancery had, at the time of the passing of the Judicature Act, exclusive jurisdiction; this being at that time the criterion upon which the right to demand a jury by a mere jury notice depended, as well as the criterion as to the mode of trial pointed out by sec. 45 of the Judicature Act of 1881.

Prior to that statute, Surrogate Court proceedings could be transferred to the Court of Chancery, and then fell under the general provisions of the Chancery Act, which contained a provision authorizing an order directing a trial by jury.

By the section in question, in cases in which the Court of Chancery had exclusive jurisdiction, "the mode of trial shall be according to the present practice of the Court of Chancery."

In the revision of 1887, this section was recast, and assumed the form in which it is now found, as sec. 103, which provides that "all causes, matters, and issues over the subject of which, prior to the Administration of Justice Act of 1873, the Court of Chancery had exclusive jurisdiction, shall be tried without a jury, unless otherwise ordered." The change of date from 1881 to 1873, is in this case immaterial, because the provision of the Surrogate Act relating to transfer of cases to the Court of Chancery is found in the Consolidated Statutes of 1859.

As is pointed out in *Re Lewis*, the legislation here and in England upon this point has proceeded upon widely differing lines. The right of the heir-at-law in England to have the issue *devisavit vel non* tried by a jury was long carefully preserved to him; but here the result of our legislation is, that *prima facie* the action "shall be tried without a jury," and the onus is upon the party seeking to have a jury to shew a case justifying it being "otherwise ordered."

In this case everything points to the desirability of a trial without jury. There will be many witnesses, it is said some 125, and as many experts as the law or the trial Judge may allow to be called. The trial, it is said, will take two weeks. The circumstances of the case are such as to make it unlikely that the mind of the jury can be concentrated upon the real issue. As said in the case already referred to, "the cause can properly and fitly be disposed of in the ordinary way without the intervention of a jury."

Motion dismissed—costs in the cause.

HON. MR. JUSTICE KELLY.

FEBRUARY 15TH, 1912.

DEMPSTER v. RUSSELL.

3 O. W. N. 719.

Timber—Contract for Sale of Standing Timber—"Clearance of all Encumbrances, Timber Dues and Crown Dues"—Time for Removal—No Provision as to—Reasonable Time Allowed—Failure of Purchaser to Cut and Remove.

Action to recover \$2,000 for timber sold by plaintiff to defendants from certain land in the township of Armstrong, which it was claimed was to be removed and paid for by 1st April, 1911, and for damages for non-fulfilment of contract.

KELLY, J., *held* that plaintiff did not refuse nor fail to give defendants the "clearance of encumbrances, timber dues, Crown dues," or to give peaceable possession, nor did he waive his rights under the agreement and there was no justification for defendants' failure or refusal to perform their part of the contract, and plaintiff was entitled to judgment,

That the value of the timber agreed to be purchased and paid for by defendants and not so paid for, calculated at the rate of \$1.50 per M. feet, to be \$1,270, for which judgment should be entered for the plaintiff and interest from 1st April, 1911, and costs. Claim made by defendants was dismissed with costs.

Action tried at North Bay non-jury sittings, December 12th, 1911.

A. G. Slaght, for the plaintiff.

M. F. Pumaville, for the defendants.

HON. MR. JUSTICE KELLY:—The plaintiff by agreement dated October 27th, 1909, and November 6th, 1909, bargained and sold to defendants all the merchantable timber on the south half of lot 1, and on the south half of lot 2, in the second concession of the township of Armstrong, in the district of Nipissing, except certain portions reserved by the agreement, the defendants to have two years to remove the timber, the plaintiff to give the defendants "a free clearance of all encumbrances, timber dues, and Crown dues," and also to give defendants quiet and peaceable possession for the removal of the timber; the price to be paid being \$1.50 per thousand feet log measure, measurement to be with what is known as Schribner's log rule; the payment to be made, \$200 on February 1st, 1910, and the balance of the price of the timber taken out in the season of 1909-1910, on April 1st, 1910, "and the operations for the season of 1910 and 1911 on the terms and conditions as aforesaid, and all

to be completed by the first day of April, 1911, when final settlement will be made as described in this agreement."

The agreement was drawn by defendant R. S. Russell, and, before being signed, at plaintiff's request there was added, immediately following the words above quoted, the words "and to be all removed in the season of 1910, if possible, or through any unforeseen conditions."

The plaintiff's rights to the timber on the south half of lot 1, were acquired from one David Bass (the locatee of the property), under an agreement dated March 1st, 1909, a term of which was that Bass would clear plaintiff "of all dues on said timber." The plaintiff's rights to the timber on the south half of lot 2 were acquired from one Stafford (the locatee of that property), under an agreement dated September 15th, 1908, a term of which was that Stafford would give plaintiff "a free clearance of all incumbrances such as timber dues and Crown dues;" this agreement also gave plaintiff three years from its date to clear the timber from that lot.

The agreement between Bass and plaintiff did not fix any time within which the timber on the south half of lot 1 was to be removed.

Stafford transferred his rights in the property to one Neely, in 1908, and these rights were acquired by John Roulston in April, 1910; Roulston admitted at the trial that when he acquired these rights he had notice that plaintiff had a contract for the timber.

The defendants let the contract to take off the timber to Bass and one Stephenson, who proceeded to cut and remove it.

On January 11th, 1910, the plaintiff's solicitors wrote defendants that plaintiff prohibited them from drawing from his property any logs until they had been properly measured, and that plaintiff wished an opportunity to be present when the measurement was being made. The letter also stated that the solicitors had written defendants' two employees, warning them not to remove any of the logs until they had been properly measured.

Plaintiff, however, asserts that the instructions he gave the solicitors were to ask to have the logs measured at the mill.

No reply was given to this letter, nor does it appear to have affected the defendants in their operations, for the

defendants admit that when Bass and Stephenson spoke to them of the solicitors' letter, defendant R. S. Russell told them to go on with the work of taking off the timber. It is also admitted by defendants that it was not until the summer of 1910, that they decided not to go on with the contract. The work was proceeded with, and during the winter of 1910, timber was removed, for which \$459.32 was paid by defendants to the plaintiff. Before settlement was made by defendants with plaintiff for this timber, plaintiff procured, through Bass and Neely, the necessary "clearance" papers therefor, and delivered the same to defendants. Some time afterwards Bass and Roulston made some claim to be the owners of the timber on the lots in question. There appears to have been no foundation for such claim. It was also claimed by one or both of them, in the summer of 1910, that the time within which plaintiff was entitled to remove the timber had elapsed. This claim I find to be without foundation. The three years given for removal by plaintiff's agreement for the purchase of the timber on the south half of lot 2 had not expired, and though the agreement for the purchase by plaintiff of the timber on the south half of lot 1 is silent as to the time within which it was to be removed. I find that under all the circumstances, a reasonable time for such removal had not elapsed in August, 1910, when Bass claimed to be entitled to the timber. The fact that these claims were set up by Bass and Roulston was no justification for defendants' refusal or neglect to perform their contract.

Before entering into the contract, defendants had inspected the properties, and were aware of their condition, and of the improvements made thereon. They were also aware of the manner by which plaintiff had acquired the timber, his agreements for the purchase thereof having been in defendants' possession at or prior to the time defendant R. S. Russell drew the contract between plaintiff and defendants, and these agreements were recited in that contract; and there is no evidence that at the time in 1910, when Bass and Roulston stated the timber was theirs, anything had happened giving them the right to it. So little, indeed, do defendants appear to have been affected by these statements that they did not even make inquiries to ascertain if they were true.

In the summer of 1910, some discussion took place between defendant R. S. Russell and plaintiff about the balance of the timber; plaintiff says that Russell asked him to take it back, and when he asked Russell to put this request in writing he refused, but then said he would give plaintiff to the beginning of September, 1910, to cut and sell the timber to other parties.

Russell's evidence is that he gave plaintiff the privilege until September 1st to sell the timber to other parties.

Plaintiff did not exercise this privilege, but on August 29th, 1910, he wrote the defendants as follows:—

Cobalt, Aug. 29/10.

“ Russell & Sons,

“ New Liskeard, Ont.

“ Dear sirs:

“ This is to notify you that I have not sold timber and that your contract still holds.

“ I have obtained the best possible legal advice concerning possible interruptions of Bass and Roulston, and find that neither party has any right whatever to timber or to forbid you fulfilling your contract, consequently you must proceed with work until stopped by force. Then I will clear the way for you. In case of any trouble with these parties notify me at once.”

“ J. D. Wilson ”
(Witness).

“ Robt. S. Dempster ”
Cobalt, Ont.”

Defendants made no reply to this letter, nor did they do anything afterwards towards carrying out their part of the contract.

In view of these facts and of the evidence of defendant R. S. Russell that there was no interruption by plaintiff with defendants' operations except the solicitors' letter of January 11th, I find that there was no interference on the part of the plaintiff with defendants or their men preventing them from performing their contract or entitling defendants to cease operations, and that plaintiff did not prevent defendants from performing their contract.

Defendant R. S. Russell at the trial gave as a reason for defendants' failure or refusal to fulfil their contract that he feared if plaintiff failed to secure “clearance” papers for the timber, he (plaintiff) would be subject to payment of penalty dues.

With the knowledge which defendants had at the time of entering into the contract, they must have been fully aware of the possibility of such dues becoming payable, and I can only assume that they relied on plaintiff, under the terms of the contract, to protect them against such dues and the consequence of their becoming payable. Moreover, it must not be overlooked that when defendants asked for a "clearance" in respect of the timber cut in the winter of 1909-1910, the plaintiff obtained it promptly and apparently without any objection or difficulty. From this it may readily be inferred that there was then no default in complying with the Crown Timber Regulations. *Cockburn v. Muskoka* (1886), 13 O. R. 343; *Langmaid v. Mickle* (1888), 16 O. R. 111; and *McArthur v. Doons* (1891), 21 O. R. 380, cited by counsel for the defendants, had reference to pine timber and are not applicable to this case.

Plaintiff, therefore, did not refuse or fail to give defendants the "clearance" of encumbrances, timber dues and Crown dues, or to give peaceable possession such as he contracted to give.

It is clear, too, from the evidence, that plaintiff did not waive his rights under the agreement, and there was no justification for defendants' failure or refusal to perform their part of the contract.

Then as to the amount to which plaintiff is entitled.

Plaintiff not being in default and not having waived the contract or treated it as otherwise than in force, he was entitled to insist on its performance by defendants. Defendants, however, allowed the time to run on without doing anything towards cutting and removing the timber, from the spring of 1910 until the time had expired for completion and settlement, and thus made it practically impossible for plaintiff otherwise to get the benefit of the timber, as the time given him by his vendors for removal of it was nearing its expiration, if, indeed, in the case of one lot it had not then expired.

The uncontradicted evidence is that there remained on the properties from which plaintiff sold the timber to defendants merchantable timber contracted to be sold by the plaintiff to defendants, to the amount of 881,200 feet. It was shewn that in the case of standing timber, such as is in question here, there is the possibility of there being some affected

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by rot or decay. Unfortunately, however, the evidence does not shew what percentage of the whole was likely to have been so affected. Making what I believe under the circumstances to be a reasonable allowance for such defects, I find the value of the timber agreed to be purchased for by defendants, and not so paid for, calculated at the rate of \$1.50 per thousand feet, to be \$1,270.

There will, therefore, be judgment for the plaintiff for \$1,270 and interest from April 1st, 1911, and costs. The claim made by the defendants is dismissed with costs.

COURT OF APPEAL.

FEBRUARY 15TH, 1912.

SIVEN v. TEMISCAMING MINING CO.

3 O. W. N. 695.

Negligence—Personal Injuries—Accident to Miner Caused by Falling Rock—Defect in Works—(1908) Ont. Mining Act, sec. 164, sub-secs. 17 and 31—Argument Based on Finding of Jury—Definition of "Pentice."

Action against a mining company to recover \$3,000 damages for injuries to plaintiff's hand, sustained by the falling of a large rock down a shaft, alleged to be due to a defective condition of the works, within provisions of Ont. Mining Act (1908), s. 164, s.-ss. (17), (31). The jury found negligence due to defective works as a "pentice" over the shaft had not been provided.

FALCONBRIDGE, C.J.K.B., *held*, 19 O. W. R. 436, that plaintiff proved and the jury found failure by defendants to comply with s.-ss. 17 & 31 of s. 164 of Ont. Mining Act. Judgment for plaintiff for \$2,500 and costs.

COURT OF APPEAL dismissed defendants' appeal with costs, MEREDITH, J.A., dissenting.

Discussion as to meaning of word "pentice" as used in the Mining Act.

An appeal by the defendants from a judgment of HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B., 19 O. W. R. 436, in favour of the plaintiff, after trial by jury.

The appeal to the Court of Appeal was heard by HON. SIR CHARLES MOSS, C.J.O., HON. MR. JUSTICE GARROW, HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MEREDITH and HON. MR. JUSTICE MAGEE.

H. E. Rose, K.C., and G. H. Sedgewick, for the defendants, appellants.

A. G. Slaght, for the plaintiff, respondent.

HON. MR. JUSTICE GARROW:—The statement of claim alleges that the plaintiff while in the employment of the defendants as a miner, on the 13th January, 1910, was engaged in running a drill at the bottom of a shaft or winze from the third level in the defendants' mine, when a piece of rock from the third level came down the shaft or winze upon the plaintiff and severely injured him; that the injury was caused by a defective condition of the ways, works, etc., of the defendants' mine whereby the same were left unprotected or insufficiently protected; that the defendants were further negligent by a failure to have its working parts examined by a competent officer, and in not ascertaining that they were in a safe and efficient working condition, and in not keeping loose and falling rock clear from the shaft or winze in which the plaintiff was employed, and in not sufficiently protecting the head of such shaft or winze as required by section 164, sub-sections 17 and 31 of the Mining Act, 1908, and amendments thereto. And the plaintiff claimed to recover under the common law, the Mining Act, and the Workmen's Compensation for Injuries Act.

The statement of defence set up, as to the claim under the common law, was that they had employed competent servants and supplied them with proper material and appliances for the proper and efficient maintenance and management of the defendants' premises, plant and business, and that the negligence if any was that of a fellow-servant, that the defendants' system of carrying on their business was the best and safest which they had been able to discover or devise, and was not such as to be liable to cause or contribute to the plaintiff's injury, and that the plaintiff voluntarily assumed the risk; that the defendants had not been negligent, and that the plaintiff was guilty of contributory negligence; as to the claim under the Workmen's Compensation for Injuries Act, that no notice of the claim had been given within the time specified in the Act, nor had the action been brought within the period in that behalf therein prescribed. And generally, the defendants denied that they had been negligent or had neglected any duty owing to the plaintiff.

Several witnesses were examined on both sides and from the testimony so adduced the essential facts appear to be as follows:—The plaintiff was severely injured and disabled by a piece of rock falling down the shaft in which he was working, through no fault of his. The rock came through a

by rot or decay. Unfortunately, however, the evidence does not shew what percentage of the whole was likely to have been so affected. Making what I believe under the circumstances to be a reasonable allowance for such defects, I find the value of the timber agreed to be purchased for by defendants, and not so paid for, calculated at the rate of \$1.50 per thousand feet, to be \$1,270.

There will, therefore, be judgment for the plaintiff for \$1,270 and interest from April 1st, 1911, and costs. The claim made by the defendants is dismissed with costs.

COURT OF APPEAL.

FEBRUARY 15TH, 1912.

SIVEN v. TEMISCAMING MINING CO.

3 O. W. N. 695.

Negligence—Personal Injuries—Accident to Miner Caused by Falling Rock—Defect in Works—(1908) Ont. Mining Act, sec. 164, sub-secs. 17 and 31—Argument Based on Finding of Jury—Definition of "Pentice."

Action against a mining company to recover \$3,000 damages for injuries to plaintiff's hand, sustained by the falling of a large rock down a shaft, alleged to be due to a defective condition of the works, within provisions of Ont. Mining Act (1908), s. 164, s.-ss. (17), (31). The jury found negligence due to defective works as a "pentice" over the shaft had not been provided.

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COURT OF APPEAL dismissed defendants' appeal with costs, MEREDITH, J.A., dissenting.

Discussion as to meaning of word "pentice" as used in the Mining Act.

An appeal by the defendants from a judgment of HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B., 19 O. W. R. 436, in favour of the plaintiff, after trial by jury.

The appeal to the Court of Appeal was heard by HON. SIR CHARLES MOSS, C.J.O., HON. MR. JUSTICE GARROW, HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MEREDITH and HON. MR. JUSTICE MAGEE.

H. E. Rose, K.C., and G. H. Sedgewick, for the defendants, appellants.

A. G. Slaght, for the plaintiff, respondent.

HON. MR. JUSTICE GARROW:—The statement of claim alleges that the plaintiff while in the employment of the defendants as a miner, on the 13th January, 1910, was engaged in running a drill at the bottom of a shaft or winze from the third level in the defendants' mine, when a piece of rock from the third level came down the shaft or winze upon the plaintiff and severely injured him; that the injury was caused by a defective condition of the ways, works, etc., of the defendants' mine whereby the same were left unprotected or insufficiently protected; that the defendants were further negligent by a failure to have its working parts examined by a competent officer, and in not ascertaining that they were in a safe and efficient working condition, and in not keeping loose and falling rock clear from the shaft or winze in which the plaintiff was employed, and in not sufficiently protecting the head of such shaft or winze as required by section 164, sub-sections 17 and 31 of the Mining Act, 1908, and amendments thereto. And the plaintiff claimed to recover under the common law, the Mining Act, and the Workmen's Compensation for Injuries Act.

The statement of defence set up, as to the claim under the common law, was that they had employed competent servants and supplied them with proper material and appliances for the proper and efficient maintenance and management of the defendants' premises, plant and business, and that the negligence if any was that of a fellow-servant, that the defendants' system of carrying on their business was the best and safest which they had been able to discover or devise, and was not such as to be liable to cause or contribute to the plaintiff's injury, and that the plaintiff voluntarily assumed the risk; that the defendants had not been negligent, and that the plaintiff was guilty of contributory negligence; as to the claim under the Workmen's Compensation for Injuries Act, that no notice of the claim had been given within the time specified in the Act, nor had the action been brought within the period in that behalf therein prescribed. And generally, the defendants denied that they had been negligent or had neglected any duty owing to the plaintiff.

Several witnesses were examined on both sides and from the testimony so adduced the essential facts appear to be as follows:—The plaintiff was severely injured and disabled by a piece of rock falling down the shaft in which he was working, through no fault of his. The rock came through a

manhole situated above the mouth of the shaft where men were engaged in what is called "stoping." The stope is an overhead excavation, which was being made in the roof of the 300 foot level, below which was the shaft or winze in which the plaintiff was working. The entry into the stope was made through this manhole which was reached by a ladder resting on the floor of the level near the mouth of the lower shaft or winze in which the plaintiff was working. There was at the time a trap-door or covering over the mouth of the shaft or winze in which the plaintiff was, but which unfortunately was open at the time of the accident. If it had been closed the injury to the plaintiff would not have occurred. This trap-door could not be and was not intended to be kept closed all the time. It had to be opened from time to time to permit men to pass up and down with the drills which the plaintiff was using, and it was open at the time, so the plaintiff said, to let the drill bucket down.

Before proceeding with the stoping, Kelly the workman in charge, sent his helper (Crabbe) to see that this trap-door was closed, and Crabbe called back that "everything was all right," upon which the stoping proceeded.

Kelly was examined as a witness, but Crabbe was not. It was Crabbe's duty, so Kelly said, not only to see that this trap-door was closed, but to remain near and see that it remained closed while the stoping operation was going on. That he did not do so is evident by the undisputed fact that it was open, or the plaintiff would not have been injured in the manner in which no one disputes he was.

The learned Chief Justice left the case to the jury in a very full and careful charge to which no substantial objection was taken, and the jury answered the questions submitted as follows:—

Q. Were the plaintiff's injuries caused by the negligence of the defendants? A. Yes.

Q. If so, what was their negligence? A. In not providing proper pentice over the manhole into the stope.

Q. Did the defendants fail to provide a suitable pentice for the protection of workmen in the shaft in which the plaintiff was injured (as required by sub-sec. 17, sec. 164 of The Mining Act of Ontario)? A. Yes.

Q. Did the defendant fail to comply with sub-section 31 of section 164, by examining the working shaft, level and stope, in order to ascertain that they were in a safe and

efficient working condition? A. We are of the opinion that the shaft boss or other officer going through the mine in the ordinary discharge of his duties does not fulfil the requirements of this sub-section. There has been no evidence produced to shew that systematic examination of the work was carried on.

Q. Was the plaintiff guilty of negligence which caused the accident, or which so contributed to it that but for his negligence the accident would not have happened? A. No.

Q. If you answer yes to the last question wherein did his negligence consist? (No answer.)

Q. At what sum do you assess the damages in case the plaintiff should be entitled to recover? A. \$2,500.

It was conceded that the action could not be maintained under the Workmen's Compensation for Injuries Act because it had not been commenced in time.

And the defendants contend that there was no evidence proper for the jury of negligence at common law, or of a breach of duty under the provisions of the Mining Act sufficient to entitle the plaintiff to maintain the action.

In my opinion, the plaintiff established a good cause of action against the defendants for a breach of Rule 17 of sec. 164 of the Mining Act, 8 Edw. VII., ch. 21, which provides that "where a shaft is being sunk below levels in which work is going on, a suitable pentice shall be provided for protection of the workmen in the shaft." The shaft in which the plaintiff was, was being sunk below a level in which work was going on. The circumstances therefore called upon the defendants to supply a "suitable pentice." The duty itself is too clearly expressed to admit of argument against it. The only real question is, therefore, did the evidence shew that it had been reasonably performed. The jury by their 3rd answer find generally that it was not. This finding, however, the defendants contend must be interpreted by the 2nd answer, and so interpreted means the placing of the pentice over the manhole, which they say is an unreasonable, and in fact impossible position in which to place it. I do not accede to either view, that is, that such an interpretation is compulsory, or that it would have been impossible to so place a pentice at the manhole as to have prevented rock from falling into the shaft where the plaintiff was, although it may be conceded that to do so would, to some extent, have lessened the convenience of the manhole, and would, of course, have

involved the expenditure of money. The statutory duty, however, takes no account of inconvenience, or even expense, but is quite absolute in its terms. And the defendants themselves in effect so regarded it, for while they contest the propriety, and even the possibility, of a pentice at the man-hole, they claim that the trap-door over the shaft itself was a pentice, and that having supplied it they have complied with the statute. The question was upon the evidence, and the charge, one which the jury was required to pass upon. The question itself (No. 3) was as the learned Chief Justice told the jury expressly based upon Rule 17. After reading the rule he said, "the question follows that exact language, and the plaintiffs asks you to say that the defendants did fail to provide suitable pentice." He then described the meaning of the term "pentice," and wound up his remarks upon this head as follows:—"Well, the defendant goes further and says the trap-door was a pentice, and if the trap-door had been closed as it ought to have been, that was sufficient protection for the men below. There is the argument on one side and the other, and it is for you to determine upon your view of the case, and of the evidence, whether they did provide a suitable pentice for the protection of the men, under the provisions of the Act."

Our duty, as I understand it, is to sustain the judgment if there was reasonable evidence to support the findings if the findings themselves are reasonably sufficient to determine the issues between the parties. It sometimes happens that a finding is imperfect, or that two or more findings are inconsistent or even contradictory of each other. In such cases the remedy is usually a new trial, a thing to be avoided unless it is clearly required in the interests of justice. In this case, having regard to the whole evidence, the charge, and the findings, I am quite unable to see any imperfection or inconsistency which requires our interference.

Nothing that I see requires the third answer to be confined as the defendants contend. On the contrary, it seems to cover, or at least to be sufficient to cover other and wider ground than was intended by the second answer, and is in my opinion upon the evidence the more complete and satisfactory answer of the two. The trap-door if kept shut would, as the learned Chief Justice seemed to think, have been a "suitable pentice" in the language of the Act, but when open was no pentice at all. And for the failure to keep it shut,

it defendants and not the plaintiff should suffer; the defence of common employment it need scarcely be said having no application in the case of a breach of statutory duty; see *Groves v. Wimbourne*, [1898] 2 Q. B. 402; *Sault Ste. Marie Pulp Co. v. Meyers*, 33 S. C. R. 23.

This conclusion makes it unnecessary to consider the effect of the answer to the 4th question.

I would dismiss the appeal with costs.

HON. SIR CHARLES MOSS, C.J.O., and HON. MR. JUSTICE MACLAREN:—We agree.

HON. MR. JUSTICE MAGEE:—It is manifest from the reading of section 164 of the Mining Act that the danger to be guarded against by a suitable pentice over a shaft, is not that from the fall of tools or material falling from within the shaft itself but from the carrying on of work in levels above the shaft. Therefore, while perforce it must be adapted to the confined space, it should above all be sufficient for protection against that danger. I see nothing to say of what particular shape or how close to the shaft it must be, but it must be sufficient, and if it is not the Act has not been complied with. A covering from outside danger which yet would allow free access to the shaft for workmen and for hoisting from and into it might readily be provided. But the very object of the Act is that there shall be something beside the carefulness of workmen which shall protect those who cannot protect themselves in the space below, and if it is to be effective and suitable it should be in operation, without dependence on carefulness, and should only be out of operation when interfered with improperly.

Here the evidence is that in the ordinary course of operation the trap-door was frequently and necessarily open and while open no covering over it or protection was provided against the danger from the operations in the stope overhead nearby. That was left to the carefulness of the workmen only, and the improbability of that happening which did happen. The only wonder to me is that it did not happen before. And so far as I can see a few short sloping boards inside the stope in front of the so-called manhole would have prevented the danger and yet afforded access to the stope behind them. That was the "work going on" in the level below which the shaft was sunk and was the very thing from

which there was most danger to be apprehended, and unless danger from that source to the men in the shaft was guarded against the pentice from other dangers was ineffectual, and if it had been guarded against there was practically little danger so far as shewn from other sources. That, I think, was what the jury had in mind by their second finding, not a pentice for the manhole, but a pentice for the shaft against that danger from the manhole. In that finding they were well warranted by the evidence, and it is no answer to say that the foreman or someone else sent someone to see at the last moment that the pentice, insufficient because open pentice, was made sufficient for the time being by closing it.

I would dismiss the appeal.

HON. MR. JUSTICE MEREDITH (*dissenting*):—There is nothing extraordinary in the words “a suitable pentice.” A suitable pentice is merely a suitable covering to save those below from things falling from above, protection from many more things than that which in falling from the vast slope extraordinarily found its way from stope through the small “manhole” between the stope and the shaft and then through the small opening in the covering of the shaft called the trap-door, which happened to be open at the very moment when the work which loosened the rock, which caused the plaintiff’s injury, was begun, open through the direct neglect of the plaintiff’s fellow-workmen or workman, in regard to the closing of the trap-door. The workman who did the work which loosened the stone was Kelly, and he, before beginning that work, directed the other fellow-workman Crabbe to see that the trap-door was closed; Crabbe negligently reported to Kelly that the door was closed, and this negligence was the direct and immediate cause of the plaintiff’s injury.

The covering of the shaft which I have mentioned was a perfect safe-guard of the shaft below it when the trap-door was closed. A trap-door was obviously necessary for the working of the mine; it was the only means of access for men and material to the shaft below it; and, of course, miners below are in danger from anything that may fall down upon them, whether bucket, man, tool, or material, as much as rock being loosened.

It is said that the covering was not a pentice because it had a trap-door in it; but how can that be if, as is the fact here, a trap-door was necessary for the working of the mine?

Then it is said that there should have been a pentice over the "manhole;" but how can that be? It would mean two pentices, if the covering of the shaft be, as it obviously is, whether suitable or not, one. Beside that, if a pentice over the "manhole" were what the law requires, if it answered the requirement of the statute, the other would not be required, and, notwithstanding its provisions, might be removed, exposing the workmen in the shaft to manifest danger which the Act intended to provide against, and against which the "manhole" pentice would afford no sort of protection.

I would allow the appeal and dismiss the action, which should have been brought against the men or man whose negligence caused the injury, or the defendants under the Workmen's Compensation for Injuries Act.

HON. MR. JUSTICE LATCHFORD.

FEBRUARY 22ND, 1912.

ALEXANDER v. HERMAN.

3 O. W. N. 755.

Landlord and Tenant—Lease—Action to Set Aside—Ground Fraud and Misrepresentation—Indefinite Right of and Terms for Renewal of Lease—Agreement for Sale—Notice of Lease—Effect of on Purchaser—Estoppel—Recognition of Tenancy—Act Respecting Short Forms of Leases—Contract for Renewal not Binding on Assigns—Renewal in Perpetuity.

LATCHFORD, J., dismissed with costs an action by two plaintiffs, Alexander and Johnston, for possession of that portion of the building now occupied by the defendants, being one-half of the basement and the first floor, with the exception of the south-east room within the building situate on East Sandwich street, Windsor, known as the old city hall, or to have a certain lease made by the plaintiff to the defendant reformed or set aside as having been obtained by misrepresentation and on the ground that the said lease is too indefinite, as it does not specify the time of the termination of same.

J. W. Hanna, K.C., for the plaintiffs.

S. C. Smoke, K.C., for the defendants.

HON. MR. JUSTICE LATCHFORD:—At the trial I found that the lease in question in this action was not obtained by fraud or misrepresentation as the plaintiffs allege.

Alexander, like Herman, resided in Detroit, and there carried on in partnership with his son a combined dry-goods and grocery business. He was the owner of a prop-

erty in Windsor known as the old city hall. Herman, under the name of the Diamond Power Specialty Company, was a manufacturer of labour-saving and fuel-saving devices; and, desiring to establish a branch in Ontario, he applied to Alexander for a lease of the latter's property in Windsor. Herman desired to obtain a lease for three years. This Alexander refused. The negotiations ended, according to Alexander, in an agreement that a lease was to be made for one year certain, with right of renewal for another year, "if the property was not sold."

The defendant's brother, who conducted most of the negotiations with Alexander, says the arrangement was "we were to have the privilege of renewing as long as we desired," and his evidence is corroborated by the defendant himself. The preparation of the lease was wholly in the hands of the defendant and his brother.

Alexander says: "They brought the lease to my place, I signed it, and they took it away." It was made in duplicate, but a part was not left with the lessor. Ten days later he wrote to Herman for what he called "a copy," and was sent one of the parts.

The lease, which expressed to be made in pursuance of the Act respecting Short Forms of Leases R. S. O. 1887, ch. 119, is not in fact made pursuant to that act. It is not under seal; and the Act has application only to leases that are under seal. (Sec. 1). It purports to demise and lease to Herman the old city hall, with its appurtenances, for a term of one year—from July 1st, 1908, to July 1st, 1909—at a monthly rental of \$25. There are two clauses regarding renewals. The first, which is not questioned—though not limited to the event of a sale—is as follows:—

"And it is further agreed that if the said lessee so desires, at the end of the said term of one year he shall have the privilege of renewing the said lease for a period of one year from the said date at the same rental and on the same terms and conditions as the present lease."

Then follows this provision: "The lessee shall have the privilege of renewing the said lease from year to year at the expiration of any year, so long as he may care so to do."

Alexander alleges that this clause is contrary to what was agreed to between him and the defendant; that he executed the lease without knowledge that it contained this

provision; and that it came to his knowledge only after he had agreed to sell the property to his co-plaintiff Johnston.

Herman entered into possession in July, 1908. On February 12th, 1909, he sublet a part of the building to Johnston for a term of one year from that date, at \$20 per month, with a right of renewal if desired, for a further term of five months.

During the term of the original lease, on April 1st, 1909, Johnston agreed to purchase and Alexander to sell the property. The agreement is in writing, and is expressly subject to the lease to the defendant. On the same day a formal assignment to Johnston was endorsed upon the duplicate lease in the possession of Alexander, and duly executed.

It therefore appears that Johnston agreed to purchase the premises with notice of the terms of the lease. He swears that he was not aware of the clause regarding renewals until two or three days after he agreed to purchase. This I regard as improbable. The evidence on the point is unsatisfactory. It may be that he did not consider the right of renewal to be binding on a grantee from Alexander. But that Johnston thought a renewal might be had for a third year from the date of the lease is indicated by the fact that in his sublease from Herman he himself obtained a right of renewal which if exercised—and it was exercised—extended his term twelve days beyond the end of the year covered by the first renewal clause.

In May, 1909, there was correspondence between the defendant and Alexander in regard to a renewal. Alexander did not disclose the fact that he had in April entered into a formal agreement to sell the property to Herman's subtenant Johnston. Ultimately, however, Alexander—notwithstanding his agreement with Johnston—agreed by his letters of May 16th and 31st to renew for one year. This the defendant ratified by his letter of June 2nd, adding "this does not thereby affect my privilege at the end of next year or any subsequent year." No formal lease was executed.

In January, 1910, notice of the defendant's desire to renew for a year under the second renewal clause of the lease was given to Alexander. No formal assent was given to this; but after the third year began, Alexander continued to accept rent from the defendant, and thereby recognised

as existing, the relation of landlord and tenant. Johnston continued in occupation of part of the premises, and paid rent therefor to the defendant.

On October 5th, 1910, Johnston, while still a tenant of the defendant, issued a writ against the defendant, claiming as grantee from Alexander that the lease should be set aside as too indefinite, and asking for possession—the precise issues in the present case.

The action was tried on April 4th, 1911, and dismissed with costs. No reason is stated for the decision. The judgment was not appealed from, and it is pleaded in the present case as a bar to Johnston's right to maintain the action. The County Court is a Court of record, and a judgment entered in it determines once for all the issues between the parties to a suit. The County Court action was against the Diamond Power Specialty Company; while in this case that company and Herman are made defendants. Upon the evidence the company is but Herman's business name, and both actions are against the same defendant. Johnston asserts now no claim that he did not assert then; and his suit herein fails and must be dismissed.

I do not adopt the contention that his co-plaintiff Alexander is in the same position; although upon his examination for discovery an answer was elicited from him that he has no interest in the property. Such an answer should be considered in the light of the circumstances under which it was made; and where, as here, it expresses merely the assent of a dull or clouded mind to a question cleverly put by able counsel, it should not, in my opinion, be regarded as of any great weight, especially when it is, as here, contradicted by documentary evidence.

Alexander, when he brought the action, was the owner of the legal estate in the land. That estate has not been conveyed to Johnston. It constitutes a substantial interest in the land, and continues until ended by a proper conveyance or by operation of law. Manifestly, when Alexander said he had no interest in the land he was under a misconception as to his rights, or answered the question without understanding it.

Nothing that Johnston did can, I think, operate as an estoppel against Alexander; and as Alexander was neither party nor privy to the action in the County Court between

Johnston and the defendant, the defence of res judicata as against Alexander fails.

But Alexander, by his acceptance of rent even after he had issued the writ in this action, unequivocally recognised, according to well-settled law, that the defendant was his tenant—at least for the year from July 1st, 1910, to July 1st, 1911; and his claim for possession must therefore fail.

There remains only the contention that the lease should be set aside on the ground that the second clause providing for renewals is too indefinite.

The agreement contained in this clause derives no strength from the Act respecting Short Forms of Lease. It is not a covenant, and does not bind the land. It is not expressed to bind—and does not, I think, bind—the heirs, assigns, or personal representatives of the lessor. I also think that it confers no rights on the heirs, assigns or personal representatives of the lessee. It is a simple contract between Alexander and Herman by which Alexander gives to Herman the privilege of renewing the lease from year to year so long as Herman may desire. The lessee's desire must, of course, be signified to the lessor. *Brewer v. Conger* (1900), 27 A. R. 10, at 14. When that is done, the only uncertain element in the agreement is made certain.

It is argued that the lease is void because it provides for renewals in perpetuo. Even if it provided for perpetual renewal it would not necessarily be void. The Courts lean against such renewals, but recognise them when properly expressed: *Baynham v. Guy's Hospital* (1796), 3 Ves. 295. In *Clinch v. Pernet* (1895), 24 S. C. R. 385, it was held that the lease in question in that case was renewable in perpetuity.

But the lease between Alexander and Herman is not renewable in perpetuity. It can, in my opinion, be renewed only while Herman personally, and not any one claiming by, through, or under him, "cares so to do"; and may be exercised only while Alexander lives and continues to own the property. Alexander has already passed the age which few survive, and he may dispose of the property at any time. He could admittedly have given a right to renew during his lifetime, and has in fact done no more.

The action fails on all grounds, and must be dismissed with costs.

HON. MR. JUSTICE MIDDLETON. FEBRUARY 23RD, 1912.

RE GRIFFIN.

3 O. W. N. 759.

*Executors and Administrators—Compensation—Commission and Costs
—Question as to Allowance for—Appeal from Order of Surrogate
Judge Fixing Amounts.*

MIDDLETON, J., varied the order as to certain items. Appellant residuary legatees given costs against executors, if asked.

Re Morrison, 13 O. W. R. 767, determines that the provisions of the tariff govern solicitors' costs.

An appeal by the residuary legatees under the will of the late G. H. Griffin, from an order of HIS HONOUR JUDGE McWATT, dated 23rd January, 1912, made on the executors passing accounts, fixing the compensation and costs of the executors.

R. C. H. Cassels, for the appellant, residuary legatees.

J. D. Montgomery, for the respondent, executors.

HON. MR. JUSTICE MIDDLETON:—The testator appointed as his executors two members of the firm who acted as his solicitors, with the direction that one executor should "have the sole winding-up of the said estate and that whichever of my said executors shall wind up my estate that he shall be entitled to charge the ordinary solicitor's fees against the said estate; the legacies herein given to my executors not being given for services to be rendered in connection with my said estate by them or either of them."

This is consistent only with the idea that the acting executor was to receive for his remuneration such fees as a solicitor would charge for the services rendered, and is quite inconsistent with the idea that the executors were to have not only this remuneration for professional services but also commission.

The Surrogate Judge has allowed \$376.02 costs and \$3,000 under the trustee act for care, pains and trouble "to the present time."

The parties on the argument agreed that I should deal with the matter upon the footing that the amount to be allowed covers the entire services rendered and to be rendered by the executors, as the residuary legatee elects

to take over the estate in specie; and nothing remains to be done save to hold a small sum, comparatively, to answer an annuity.

The estate was all well invested in stocks, etc., and the executors have had to sell some of this to pay specific legacies.

The testator died on the 10th October, 1910, and the trust is not one for investment and reinvestment as in *Re Williams*.

The income secured is	\$4,022 67
and per sub. acc't.	983 65
	<hr/>
	\$5,006 32

None of this had to be "collected" in the ordinary sense, as it consisted of 25 dividend cheques which only had to be endorsed and deposited.

Some stock was sold through brokers, and the cheques for the proceeds deposited. This (covering 5 transactions) amounted to less than \$16,000. Life insurance amounting to \$3,643 was received from two policies.

A sum of \$4,200 was borrowed from the Lambton Loan upon stock, and was repaid.

About \$4,000 was in the bank to the testator's credit.

About 40 cheques were issued to legatees, and less than 20 in payment of debts, funeral and testamentary expenses, and succession duty.

The solicitor's bill of \$376 is not produced; but it must cover practically all that was done.

All that remains to be done is to set apart two sums of \$4,000 and \$2,000—\$6,000 in all—to answer legacies to R. S. W. Heighem and F. W. Griffin, and to pay \$450 for a monument. The rest of the estate, about \$60,000, consisting of \$1,600 in the bank and stock in 8 companies, can be transferred to the residuary legatee.

If one per cent. is allowed on the dividend cheques (\$5,000) and on the stock sold (\$16,000), and one per cent. on the money paid out (about \$27,000)—say \$500 in all—there would be a most liberal allowance in addition to the \$376 charged for costs.

The residuary legatee on the argument expressed willingness to allow \$1,000 in all, and I would therefore fix the commission at \$1,000, including the costs, or say \$625 in addition to the costs.

In a very similar case of *Re West*, determined by Mr. Justice Osler in 1894, he confirmed an allowance of a very much smaller sum for commission.

The learned Surrogate Judge gave no reason for fixing the commission at \$3,000; and counsel for the executors stated it was $2\frac{1}{3}$ per cent. on the cash received and $2\frac{1}{2}$ per cent. on the cash disbursed. It is really about 10 per cent. on the amount passing through the executor's hands, if the temporary loan is ignored.

A second question is raised as to the costs allowed. For attending the audit of these simple accounts, the Judge, in addition to the usual solicitor's charges, has allowed by fiat a counsel fee to the executors of \$100, and \$50 to counsel for the residuary legatee; and has allowed \$59.03 to the agent for the official guardian, including a fee of \$50.

The infants were in no way interested, as their specific pecuniary legacies were paid in full.

Assuming that any counsel fee is proper, the rules limit the power of the Judge to an allowance, as a maximum, of \$25.

Re Morrison, 13 O. W. R. 767, determines that the provisions of the tariff govern—if any authority is needed for so self-evident a proposition.

The order of the Surrogate Judge must be amended in accordance with the above, and the appellant should have his costs against the executors if asked.

HON. MR. JUSTICE CLUTE.

FEBRUARY 28TH, 1912.

RE GEORGE CORKETT ESTATE.

3 O. W. N. 761.

Will—Construction—Motion for Under Con. Rule 938—Division of Residue—Maintenance of Children—Sale of Residence—Costs.

Motion by the executors under Con. Rule 938, for an order construing the will of the late George Corkett.

F. Aylesworth, for the executors.

B. F. Justin, K.C., for W. George Corkett.

E. C. Cattenach, for the infants.

R. G. Agnew, for Mrs. Kogg (Margaret Jane Corkett).

HON. MR. JUSTICE CLUTE:—The testator, George Corkett, by his will devised his farm, the west half of lot 4 in the township of Albion, to his executors and trustees until his son, William George, shall have arrived at the age of 25 years, and then to his said son in fee simple. He directed the rents and profits thereof to be applied to the support, maintenance and education of his children.

He then devised his house and lot in Brampton to his trustees to hold in trust until his youngest child arrived at the age of 21 years, the residence to be used as a home for his children "until such time," and after the youngest child arrived at 21 years he directs a sale and division of the proceeds to be made equally among his three children.

He also gave his executors power to sell the residence before the youngest child arrived at 21 years of age and purchase another, if they thought proper, for the use of his children until the youngest child arrived at 21 years of age, the new purchase to be held upon the same conditions and trust as his said residence.

He directed his executors and trustees to invest the residue of his estate, and to apply the interest, dividends and profits arising from such investment, as may be necessary, to the support, maintenance and education of his children until his daughter Margaret shall have attained the age of 21 years, at which time he directs the executors to pay over to her the sum of \$1,000 and to keep the residue invested and apply the interest therefrom to the support of his children until his said daughter arrives at the age of 26 years, at which time he directs that she shall be paid "the one-third of the said residue of my estate after deducting the one thousand dollars previously paid to her," and that the trustees shall keep the residue then remaining invested and apply the interest arising therefrom to the support, maintenance and education of his children, William George Corkett and Cecil Mansfield Corkett, till William George shall have arrived at the age of 25 years, at which time he directs the executors to pay over to his son William George one-half of the residue then remaining and thereafter directs the executors and trustees to invest the then residue and apply so much of the interest arising therefrom as may be necessary for the support and maintenance of his son Cecil Mansfield Corkett till he shall have attained the age of 21 years, at which time the balance

or residue then remaining shall be paid to his said son Cecil Mansfield.

He directs, if necessary, portions of the principal to be used for the support, maintenance and education of his children.

In his codicil, after reciting that he had bequeathed to his son George William one-half of his estate after payment to his daughter Margaret her one-third share, he declares it to be his will that "instead of my said son being bequeathed the said one-half of the residue as aforesaid that he be and he is thereby bequeathed the sum of one thousand and five hundred dollars in cash and the one-third part or share of the proceeds of the sale of my said residue, the balance to be divided between my said daughter Margaret Jennie Corkett and my son Cecil Mansfield Corkett according to the terms and conditions specified as to the other bequests made by my said will."

The questions submitted in the notice of motion do not cover the grounds taken in argument as to the construction of the will. I am of opinion that by the true construction of the will the expense for the maintenance of the dwelling house as a residence for the children for the period limited by the will should be paid out of the income of the estate if that be sufficient as it would appear that it is, and if not sufficient out of the corpus.

That such support shall continue for the benefit of the three children until Margaret arrived at the age of 21 years, when she should receive one thousand dollars, and that the interest upon the residue should then be applied for the support, maintenance and education of all the children until Margaret arrive at 26 years of age.

That she is then entitled to receive one-third of the residue of the estate after deducting one thousand dollars previously paid to her; that is, as I understand the rather obscurely expressed will, that whatever the residue may be she is entitled to one-third of that, but inasmuch as she has received the thousand dollars that sum is to be deducted from her share; thus, if the residue before the thousand dollars had been paid is \$6,000 she would be entitled to \$2,000, and having received one thousand dollars she would be entitled to the balance of one thousand dollars. It does not mean, I think, that the thousand dollars paid to her is to be first deducted from the residue, that from that sum then she is to

receive one-third and that the thousand dollars should again be deducted from it. That would, in effect, be deducting the thousand twice.

I am also of opinion that the children Margaret and William George are entitled to what is a fair allowance for their maintenance whether that maintenance, support and education be upon the premises or not. In case the parties differ as to what a reasonable sum would be, the Surrogate Court may adjust that matter in settling the accounts of the executors.

It will be noticed that the one-half of the residue given to William George is the one-half remaining after one-third of the whole residue had been paid to Margaret, that is, it is one-third of the residue. In the codicil it is this one-third of the whole residue or one-half of the remaining residue that is referred to, and instead of William George being bequeathed one-half of the residue after the payment to Margaret he is bequeathed the sum of \$1,500 in cash, and he is also given a one-third share of the proceeds of the residue.

Then comes the expression, the meaning of which is disputed: "The balance to be divided between my said daughter Margaret Jennie Corkett and my son Cecil Mansfield Corkett according to the terms and conditions specified as to the other bequests made by my will." What balance? Does it mean the balance of the residue after paying one-third to William George or the balance of the residue of the estate, or both? Some light is thrown upon it by the last clause. The division is to be made according to the terms and conditions specified in the other bequests of the will. What other bequests? Clearly, I think the bequests which affect the half residue mentioned and also the bequests upon the sale of the residue.

By a former provision, upon a sale of the residence, the proceeds were to be equally divided "amongst my three children in equal shares." Before the codicil was made Margaret had received her thousand dollars and one-third of the residue and was yet entitled to receive one-third of the proceeds from the sale of the residence, and any amount remaining unpaid for maintenance, etc.

William George Corkett by the codicil is now given \$1,500 and one-third of the proceeds of the residence instead of his one-half of the residue after Margaret had been paid. The residue of the estate, in my opinion, goes to the younger son

Cecil Mansfield Corkett, each of the three children receiving one-third of the proceeds from the sale of the residence.

Costs out of the estate. The costs of the executors between solicitor and client.

HON. MR. JUSTICE KELLY.

FEBRUARY 28TH, 1912.

UNDERWOOD v. COX.

3 O. W. N. 765.

Contract—Settlement of Claims under Will—Action to Enforce—Defence Fraud and Misrepresentation — Absence of Independent Advice — Confidential Relationship — Document Signed without being Read Over.

KELLY, J., *held* that the settlement was deliberately made and the fact that one party to it afterwards became dissatisfied with it, is not of itself a sufficient reason for seeking to be relieved from it. Judgment for plaintiffs with costs.

Action by William J. Underwood and his sister, Catharine Laurie, against their sister, Jane Cox, for payment of \$964.70 and interest, claimed as their two-thirds share of an amount agreed by the defendant to be paid to the plaintiff and another sister, Mary Ann Cox, by an agreement dated May 5th, 1910.

The defence set up was that defendant was induced to sign the agreement by the misrepresentation, fraud, intimidation, duress and undue influence of plaintiff Underwood and Joseph Laurie, husband of the plaintiff Laurie, and that she signed it without knowing its contents and without legal advice as to her rights.

R. U. McPherson and J. W. McCullough, for the plaintiffs.

Gordon Waldron, for the defendant.

HON. MR. JUSTICE KELLY:—The parties to the agreement are children of Francis Underwood, deceased, who by his will, dated August 2nd, 1902, and a codicil thereto dated March 1st, 1905, gave to Ida Frances Cox, the minor daughter of the defendant, an organ and a mortgage which he held for \$1,000 on the property of the defendant and her husband, and all the rest of his estate to the defendant.

Testator died on March 27th, 1910, and his executors applied for probate of the will; the plaintiff Mary Ann Cox filed a caveat against issue of probate, alleging that the will was not executed by the testator, or, if so, that it was executed under undue influence and duress, and that he was not of sound mind, memory and understanding.

The real ground, however, of plaintiff Underwood's objection to the disposition made by the testator of his estate is found in the claim which he had, or believed he had, against the testator and his estate, arising out of an agreement or understanding between the father and son. Several years prior to his death the father obtained from the son a conveyance of certain property at a price much less than its real value, on the promise that, at his death, the son would be given a substantial part of his estate. The son honestly believed that he was entitled to enforce this claim against his father's estate, or to share in the assets of the estate; he also claimed the organ which his father bequeathed to defendant's minor daughter, and which, the evidence shews, had been at some time looked upon as belonging to him. The claim of plaintiff Catharine Laurie was that she had been promised by her father consideration for having nursed and cared for him for a considerable time prior to his death, and that the estate was, therefore, indebted to her. Mary Ann Cox, the other party to the agreement sued on, is not a party to these proceedings; it was stated by defendant's counsel during the progress of the trial that she was not pressing her claim.

On May 4th, 1910, the plaintiff Underwood, who lives in London, went to defendant's residence in the township of Markham, and during an interview of considerable length proposed a settlement. Defendant's husband, Walter Cox, was not present, and Underwood, after stating to defendant why he claimed to be entitled to a settlement, named an amount which would be accepted for the plaintiffs and Mary Ann Cox in full, the terms proposed being exactly those which were afterwards embodied in the agreement sued upon. Defendant, as was natural, said she wished to talk it over with her husband, and Underwood left the house with the understanding that he would return next day for her answer.

On May 5th, Underwood, accompanied by Joseph Laurie, husband of plaintiff Catharine Laurie, returned to defendant's house and had a further interview with defendant and

her husband. The proposal made on the day previous was fully and freely talked over and considered by those present, and the defendant and her husband decided to accept it; and it was suggested by defendant's husband that plaintiff Underwood draw the agreement to carry out the settlement. This Underwood refused to do. It was then suggested, and, so far as the evidence shews, by defendant, that Underwood, Walter Cox and Laurie go to one of the executors, who lived nearby, and have him draw the agreement. They went. The executor also refused to draw it, and suggested the parties going to Markham to have it drawn by a solicitor. These same three persons went together to Markham, a distance of 5½ miles, and instructions were given to a solicitor to prepare the agreement on the terms which had been agreed on at defendant's house, all three being with the solicitor when the instructions were given.

Plaintiff Underwood and defendant's husband returned to defendant's house with the agreement, which, on the way from the solicitor's office, had been signed by Mary Ann Cox.

Defendant did not then read the agreement, but she admits that she understood the proposal for settlement made by her brother on the 4th and discussed by the parties assembled at her house on the 5th. There is no doubt, and defendant admits it, that the agreement is in the exact terms then proposed. Under these circumstances its not having been read over at the time of its execution is not a ground for repudiating the agreement. *North British Ry. Co. v. Wood* (1891), 18 Ct. of Session Cases (4th series) 27.

Defendant shewed some hesitation about signing, and plaintiff, Underwood, said to her: "Now, Jane, you do not need to sign that paper, and don't sign it unless you feel that you are giving what you feel that I should have; I consider this is a just claim, and if you don't consider so, don't sign that paper," and further: "You don't have to sign it."

Defendant's husband then said: "What will happen if she don't sign it?" Underwood replied: "We will let it stand on its own merits, will let the case stand on its own merits, and the case will settle itself."

At the trial it was admitted that there was no duress; and there was no evidence of it; but it was attempted to be shewn that there was fraud and misrepresentation on the part of the plaintiff Underwood, and that he had intimidated defendant and obtained undue influence over her.

The evidence does not satisfy me that these contentions are well founded. I do not find that plaintiff Underwood or Joseph Laurie, made any misrepresentations to, or perpetrated any fraud upon, the defendant; nor do I think that any fiduciary relationship, or relationship of confidence, existed or was established between these parties such as would justify the assumption of undue influence; nor is there any evidence of intimidation.

Defendant claimed that she was in a weak state of health, that she had no independent advice, and that she was unduly pressed by the plaintiff Underwood, and was hastened into the settlement.

It is true that she was not then in the best of health, but she was not so unwell as not to be able to attend to her household duties, which she was doing unaided at that time, including the preparation of dinner for those who assembled at her home on May 5th. She was not unduly pressed or hurried into the settlement. When on May 4th she expressed her desire to be given until the following day to consult with her husband, her brother readily consented. She had for some time on May 14th until the afternoon of May 5th to confer with her husband, and obtain other independent advice, had she desired to do so, and I do not find that any circumstances arose which threw the burden on the plaintiffs of doing more than they did. See *Walter v. Andrews*, 16 Gr., at p. 640.

In *Harrison v. Guest*, 2 Jur. N. S. 911, the Lord Chancellor held the absence of professional advice no objection, when the party dealt with did not occupy a fiduciary relationship. It was also there laid down that the burden of proof is on the party seeking to set aside the transaction to shew that he has been imposed on, and it is not for him to say "I had no professional advice," unless he can shew there has been contrivance or management on the part of the person who was dealing with him, and whose transaction is sought to be set aside, to prevent him having that advice.

Nothing has happened in this case to throw that burden on the plaintiffs.

Defendant endeavoured to shew that plaintiff Underwood had used an incident in her early life as a threat to compel her to make the settlement. I do not find this to have been the fact. Defendant's evidence is that she did not know if her brother knew of this incident, that he had never men-

tioned it to her, and when she herself mentioned the subject on May 4th, she cannot remember his making any reply. Her brother denies having alluded to it.

It was argued on behalf of the defendant that the filing of the caveat was not the proper procedure by which Underwood could establish his claim. He, however, believed that whatever procedure was adopted by his solicitor in London, who prepared the caveat, was the necessary procedure by which to establish his claim.

The settlement was, to my mind, deliberately made, and the fact that one party to it afterwards became dissatisfied with it, is not of itself a sufficient reason for seeking to be relieved from it. In many instances compromises or settlements are entered into which are at the time not altogether satisfactory to one or other of the parties, but which they, nevertheless, enter into so as to avoid the expense and anxiety attendant on litigation, or to settle doubtful claims, or for some such consideration, and the Courts uphold these compromises or settlements.

It is not unusual for a compromise to be effected on the ground that the party making it has a chance of succeeding in it, and if he bona fide believes he has a fair chance of success, he has a reasonable ground for suing, and his forbearance to sue will constitute a good consideration. *Callister v. Bischoffsheim*, L. R. 5 Q. B. 449; *Miles v. New Zealand Alford Estate Co.*, L. R. 32 C. D. 266.

These plaintiffs not only believed that they had a chance of success, but there is nothing in the evidence to shew that their claims were, in their minds, at least, other than honest ones, or that they were otherwise than honestly made. By the agreement sued upon they and Mary Ann Cox, in consideration of the payment which the defendant agreed to make, released their father's estate from all claims which they had against it and withdrew without costs, the caveat.

After a very careful consideration of the evidence, I can only conclude that the plaintiffs are entitled to succeed.

There will therefore be judgment in their favour for the amount prayed for and costs.

HON. MR. JUSTICE TEETZEL.

FEBRUARY 29TH, 1912.

WILSON v. KERNER.

3 O. W. N. 769.

Landlord and Tenant—Lease—Covenant for Renewal—Construction of—Plaintiff Claimed Entitled to Perpetual Renewal—Defendant Claimed one Renewal only.

TEETZEL, J., *held* that a covenant in a lease, for a renewal thereof, "for a further period of five years at same rental and on same terms as in lease if lessee shall so desire," is not a covenant for perpetual renewal.

Action by the executors and sole devisee under the will of Samuel Wilson, deceased, for the specific performance of a covenant in a lease, dated June 6th, 1907, from the defendant to plaintiffs' testator, which covenant is in the words following:—

"And it is hereby further agreed by and between the parties hereto that the said lessee, his executors, administrators, and assigns, shall be entitled to a renewal of this lease for a further period of five years from the expiration of the term above demised at the same rental and upon the same terms and conditions in all respects, if said lessee shall desire to hold the same for such extended term."

The lease expired on July 1st, 1911, and the only dispute in carrying out the covenant for renewal and resulting in this action arose from the claim of the plaintiffs that the renewal of the lease should contain a similar covenant for renewal to that contained in the lease of June 6th, 1907.

The position of the plaintiffs was that they were entitled to have the lease perpetually renewed, while the defendant claimed that only one renewal was called for by the covenant.

S. F. Washington, K.C., and W. A. H. Duff, K.C., for the plaintiffs.

C. J. Holman, K.C., and J. M. Telford, for the defendant.

HON. MR. JUSTICE TEETZEL:—The proper construction to be placed upon this form of covenant has long been settled both in England and in Canada to be that the lessee is not entitled to a renewal in perpetuity, but only to one renewal

unless the language used in the covenant expressly or by clear implication shews that the parties intended a renewal in perpetuity. In order to establish such a construction the intention must be unequivocally expressed, and a proviso in general terms that the renewal lease shall contain the same covenants and agreements as the lease containing the covenant for renewal has been repeatedly held not to extend to the covenant for renewal. See Woodfall, 18th ed., pp. 424, 425 and 426, and Halsbury's Laws of England, vol. 18, p. 463. where the leading cases are cited. See also *Rex v. St. Catharines Hydraulic Co.* (1910), 43 S. C. R. 595.

Taking the language of the covenant sued on, which must be the sole guide in determining the intention of the parties, there is nothing whatever to indicate that either party intended that the defendant should be under any irrevocable obligation to renew the lease either perpetually or as long beyond one renewal term as the plaintiffs without any obligation on their part to accept further renewals might choose to require it to be done.

One circumstance urged for the plaintiffs as indicating that such intention could be gathered from the covenant was the fact that in a prior lease of part of the same premises made by defendant's husband to plaintiffs' testator, the precaution had been taken of inserting in a similar covenant for renewal the words "except renewal." It is quite clear that this circumstance or any other act of the parties cannot be invoked to affect the interpretation of the plain and unambiguous language of the covenant: *Baynham v. Guy's Hospital* (1796), 3 Ves. 294; *Iggulden v. May* (1804), 9 Ves. 325; *Foa on Landlord & Tenant*, (3rd ed.), 272.

The defendant before action was and she still is willing to perform the covenant according to its proper interpretation, and only refused to execute the renewal lease tendered because of the insertion of the covenant for renewal.

The action must therefore be dismissed with costs.

Fifteen days' stay.

DIVISIONAL COURT.

FEBRUARY 24TH, 1912.

TRADERS BANK v. BINGHAM.

3 O. W. N. 772.

Sale of Goods—Construction of Contract—Agent for Sale of Goods or Purchaser—Question as to which—Time of Sale.

DIVISIONAL COURT *held*, upon the evidence, that defendant was merely agent for sale of the goods and that the property in the goods had not passed to him, and upon the termination of the agency he had a right to return the goods on hand, and was not bound to keep and pay for them. The "time of sale" means the time of sale to a purchaser. Appeal allowed with costs throughout.

An appeal by the defendant from a judgment of HIS HONOUR JUDGE TALBOT MACBETH, of Middlesex County Court, in favour of plaintiff upon an action on an assignment of a money claim, pronounced 17th December, 1911.

The appeal to Divisional Court was heard by HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B., HON. MR. JUSTICE BRITTON and HON. MR. JUSTICE MIDDLETON.

J. M. McEvoy, for the defendant, appellant.

G. N. Weekes, for the plaintiff, respondent.

HON. MR. JUSTICE MIDDLETON:—The sole question upon appeal is, whether, upon the true construction of the agreement of the 6th June, 1910, the defendant was merely appointed agent for the Folding Bath Manufacturing Company, or whether he became the purchaser of the baths in question.

The learned County Court Judge has taken the view that, under that agreement, the defendant became the purchaser, and undertook to pay for the baths within thirty days from the date of invoice. With great respect, we are unable to agree in this.

By the agreement, the company gave Bingham the selling rights of the bath in question for certain counties; and Bingham agreed to pay \$4 for each bath tub supplied "to him or his agents, in cash at the time of sale, or notes or drafts due in thirty days from the date of invoice," and the company "to accept in payment for bath tubs reliable cus-

tomers' paper in settlement of accounts." Bingham was to be entitled to retain for himself the difference between the \$4 and the price for which the bath was sold; and he further agreed to "handle" not less than twenty-five bath tubs per month.

The agreement was terminated, and Bingham has paid for all the baths sold by him, and desires to return the baths on hand. These have been tendered and refused.

We think the agreement as a whole indicates that Bingham was merely an agent, and that the property in the tubs had not passed to him, and upon the termination of the agency it would follow that he had a right to return the goods on hand, and was not bound to keep and pay for them. The "time of sale" means the time of sale to a purchaser.

The appeal should be allowed, with costs throughout.

There was no appeal as to the counterclaim, but only as to the claim for \$120. The plaintiff should have the \$23 paid into Court, but this will not interfere with its liability for costs of action.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B., and
HON. MR. JUSTICE BRITTON, concurred.

DIVISIONAL COURT.

FEBRUARY 29TH, 1912.

WELLAND COUNTY LIME WORKS CO. v. SHURR.

3 O. W. N. 775.

Mines and Minerals—Oil and Gas Leases—Agreement between Farmers and Company for Leases—To be in Usual Form—Company to Supply Farmers with Gas for Heating Free—Refusal of Farmer to Sign Lease—Action to Compel Signing of Lease—For Injunction Restraining Farmer from Interfering with Company in Taking Gas—Rental for Wells—Costs.

SUTHERLAND, J., 20 O. W. R. 637, 3 O. W. N. 398, granted orders as asked, allowing company to take gas from wells on defendant's lands. If parties cannot agree upon terms of lease within two weeks there will be a reference for the Master at Welland to settle the form. Costs to plaintiff.

DIVISIONAL COURT reversed above judgment and dismissed the action with costs.

An appeal from a judgment of HON. MR. JUSTICE SUTHERLAND, 20 O. W. R. 637.

The appeal to Divisional Court was heard by HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B., HON. MR. JUSTICE BRITTON and HON. MR. JUSTICE MIDDLETON.

S. H. Bradford, K.C., for the defendant, appellant.

W. M. German, K.C., for plaintiffs, respondents.

HON. MR. JUSTICE BRITTON.—The action is brought against the defendant Shurr to compel him to carry out all the terms of a certain agreement made on the 20th November, 1903, between the defendant and one I. W. Augustine, parties of the first part, and these plaintiffs as parties of the second part. This agreement is set out in full in the plaintiff's statement of claim. Augustine and the defendant agreed to pay to the plaintiffs, within two months after the date thereof, \$200, and to give to the plaintiffs "the usual gas and oil leases of their respective farms." No term of years or months is mentioned, but these leases were to continue so long as the plaintiffs would "continue to comply with the conditions agreed upon."

The plaintiffs agreed to supply gas pipe sufficient to run from Burnaby to front of dwellings of Augustine and defendant, and to supply free of charge sufficient gas to the houses of Augustine and defendant. What the plaintiffs agreed to do, the plaintiffs call "conditions agreed upon" and the plaintiffs were entitled to leases only when, and for so long as the plaintiffs comply with these "conditions." It is an express condition that Augustine should have supplied to him free of charge sufficient gas to heat his house. The contract the defendant made was only one made jointly with Augustine—Shurr says that he and Augustine started together—have stood together throughout and now stand together. He has the right to that position. The plaintiffs have no right to cut off Augustine, and as against the defendant, blot Augustine's name out of the contract.

The defendant squarely raises the non-joinder of Augustine as a defence. In the face of this joint agreement the plaintiffs have no right to say it is only joint and several and refuse to carry out their part as to one, while demanding performance by the other.

With great respect to the learned trial Judge, I am of opinion that the appeal should be allowed and the action dismissed with costs.

HON. MR. JUSTICE MIDDLETON.—After careful consideration, we find ourselves unable to agree with the conclusion arrived at by the learned trial Judge.

In our opinion the matter must be determined upon the terms of the written memorandum of the 20th November, 1903. In it we must find the term for which the leases mentioned are to be granted. Augustine and Shurr are to lease their respective farms; but the lease is "to continue so long as the parties of the second part continue to comply with the conditions agreed upon." The condition agreed upon is "to supply free of charge sufficient gas to heat the homes of the party of the first part."

We do not think this clause can be read that each lease is to continue so long as the company supplies to each lessor sufficient gas to heat his house. It is rather an agreement on the part of these two land owners with the company that the company should be at liberty to sink wells upon the land of either, provided the company should supply sufficient gas to heat the houses of both.

On the face of the agreement there is a joint venture on the part of these two farmers. They jointly contributed the money necessary for the laying of the pipe line; and the agreement is that gas shall be supplied to both.

We do not think that the company is entitled to now demand a lease from Shurr; because it has ceased to supply gas to Augustine, and therefore the term on which the lease was to be granted has been ended by the action of the company.

If the evidence is referred to, it goes to shew that this is the true construction and the real agreement between the parties; but we think the case fails to be determined entirely upon the written document and that it is not necessary to deal with the defendants' claim for the reformation of the agreement, as in our view the agreement accurately expresses the intent.

The appeal should be allowed, and the action should be dismissed with costs.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B., I agree.

COURT OF APPEAL.

FEBRUARY 22ND, 1912.

DARIUS WIGLE v. TOWNSHIP OF GOSFIELD
SOUTH.

3 O. W. N. 708; O. L. R.

Drains—Flooding Plaintiff's Lands—Action for Damages against Municipality—Reference to Drainage Referee—Jurisdiction of Referee—Case within Municipal Drainage Act—Building Bridge—Action Brought after Plaintiff Sold Lands—Depreciation in Selling Value—Quantum of Damages—Cause of Complaint when Arising—Limitation of Actions.

An action for damages caused by the flooding of plaintiff's lands, originally brought in the High Court, and on application of plaintiff transferred for trial to the Referee, who gave judgment to plaintiff for \$5,000 damages.

COURT OF APPEAL varied above judgment by reducing plaintiff's damages to \$1,320. Plaintiff's cross-appeal dismissed with costs and costs of defendant's appeal.

An appeal by the defendant and cross-appeal by the plaintiff from a judgment of the Drainage Referee in favour of the plaintiff.

The following statement of facts was taken from the judgment of HON. MR. JUSTICE GARROW.

The proceedings were commenced by a writ of summons issued out of the High Court, dated December 28th, 1909, and proceeded to trial in the usual way. At the trial the action was referred to the Drainage Referee for trial under the provisions of the Municipal Drainage Act.

The complaint of the plaintiff was that the defendants had by their acts interfered with the free flow of the waters in Cedar Creek by closing up a certain outlet, and erecting a bridge which materially narrowed the natural channel, thereby causing the plaintiff's lands to be flooded to his injury.

The learned Referee found the issues in favour of the plaintiff, and assessed the damages at \$5,000, for which the plaintiff was given judgment, which damages the plaintiff by his cross-appeal claimed should be increased.

The defendants besides contending that the reference was improperly made to the Drainage Referee, said that the

bridge and its openings were sufficient for the waters which by nature would flow in the stream, and that the injury of which the plaintiff complained was really caused by additional waters brought into it in large quantities by several extensive drainage schemes having their outlets above the bridge, and that in any event the damages allowed were excessive.

The defendants also contended before the Court of Appeal, that the plaintiff's claim was barred by the special limitation clauses of the Municipal Drainage Act. There was no plea of the Statute of Limitations, and even if there had been it would have been of no avail because the plaintiff's claim from its nature did not fall within the special provisions of that Act.

The appeal of the Court of Appeal was heard by HON. SIR CHARLES MOSS, C.J.O., HON. MR. JUSTICE GARROW, HON. MR. JUSTICE MACLAREN and HON. MR. JUSTICE MAGEE.

J. H. Rodd, for the municipality.

M. Wilson, K.C., for the plaintiff.

HON. SIR CHARLES MOSS, C.J.O.—This is really quite a simple case, and as viewed in the light of the evidence as developed before the Drainage Referee, might very well have been tried and disposed of at the non-jury sittings. But the parties appear to have formed and acted upon the view that it was a case proper to refer to the Drainage Referee by whom it was fully tried and this is an appeal by the defendants and cross-appeal by the plaintiff from his judgment. An objection was taken at this late stage of the case to the authority or jurisdiction of the Referee to deal with the case under the order, because, it was said, the case did not fall within the provisions of the Municipal Drainage Act, for two reasons, one being that a question of drainage was not involved; the other being that the cause of complaint arose more than two years before the commencement of the action.

The damages in respect of which the plaintiff brought his action arose from flooding of his land, the earliest having occurred on the 30th December, 1907, and the others in the years 1908 and 1909. The action was commenced on the 28th of December, 1909. The cause of the flooding was

the erection by the defendants in 1907 of a bridge across Cedar Creek which had the effect of narrowing its channel.

From the nature of the case it is apparent that the cause of complaint here is not the building of the bridge, but the damage occasioned by the subsequent floods. In other words, the cause of action is the damage and the plaintiff could not have instituted an action seeking damage until he had suffered some. Probably he could, while still owning the land, have applied for and obtained an injunction, but he did not seek this remedy and his only claim is and must be for the damage fairly and reasonably attributable to the floodings which took place before he commenced this action. And the cause of complaint in respect of these damages did not arise until within two years before the issue of the writ: *Whitehouse v. Fellowes* (1861), 10 C. B. N. S. 765. That being so, an answer to both grounds of objection to the Referee's authority is supplied by the amendment to the Municipal Drainage Act, 9 Edw. VII. ch. 78, sec. 2, now section 99 of The Municipal Drainage Act, 10 Edw. VII. ch. 90, which empowers the Court or Judge to transfer an action not only where it appears that the relief sought therein is properly the subject of proceedings under the Act, but where it appears that it may be more conveniently tried before and disposed of by the Referee. It never could have been intended that because the reason given in the order or transference afterwards turned out not to be the best reason, all that took place after the making of the order should be set aside and treated as nugatory.

Upon the evidence before him the Referee concluded that there was an improper interference with the width of the channel of Cedar Creek, the result being that in times of freshets there was an interruption of the flow of the stream, which had the effect of flooding the plaintiff's lands. This finding is in accordance with the great preponderance of the testimony.

The question is thus reduced to one of the extent to which the plaintiff suffered damages for which he ought to be compensated in this action. Having parted with the land he has now no right of action to restrain the continuance of the obstruction of the stream. Nor can he suffer damage by reason of any subsequent flooding.

One item of his claim is for depreciation in the selling value of the land by reason, as it is said, of the fear of future flooding and the prejudice against the continuance of such a state of affairs. The plaintiff did not, as he might have while still owner, take steps to prevent the possibility of such future damage. And by reason of the absence of a by-law, the case is not one in which compensation is being awarded under the provisions of the Municipal Act as for lands injuriously affected by the work that has been done. In that case every claim for compensation would be settled once for all. Here the plaintiff is confined to such damages as properly and naturally result from each flooding and alleged depreciation in the selling value is not comprised therein. This falls upon the principle that the damage, not the erection of the bridge, is the cause of action. Lord Macnaghten's statement in *West Leigh Colliery Co. v. Tunncliffe & Hampson* [1908] A. C. 27, at p. 29, made in a subsidence case, seems not to be distinguishable in principle from this case. After first expressing the opinion that the damage, not the withdrawal of support, was the cause of action, he said. "If this be so, it seems to follow that depreciation in the value of the surface owners' property brought about by the apprehension of future damage gives no cause of action by itself."

And the Lord Chancellor said (p. 34): "To say that the surface land would sell for less because of the apprehension of future subsidence is no doubt true. To say that the depreciation in present value caused by that apprehension ought to be included as an element of compensation is in my view unsound. For that is asking compensation, not for physical damage which has in fact arisen, but for the present influence on the market of a fear that more such damage may occur in future." See also *Rust v. Victoria Graving Dock Co.* (1886), 36 Ch. D. 113.

A contrary view would involve the possibility of a purchaser who acquired the property at a reduced price afterwards recovering for the future apprehended damage from persons who had already been charged for it by an allowance against them for depreciation in selling value. The sum of \$2,000 allowed by the Referee under this head should be disallowed.

With regard to the other items of the claim, a number of which appear to be unsustainable and others to be exaggerated, there were some obvious mistakes and omissions in the

summation of items. Allowing for these, and after examination of the particulars, and consideration of the evidence, it appears to me that a fair compensation to have allowed would have been the sum which my brother Garrow has named.

The result is that the judgment should be varied by reducing the sum which the plaintiff is to recover from the defendants to \$1,320, and the cross-appeal should be dismissed.

The plaintiff should pay the costs of the appeal and cross-appeal.

HON. MR. JUSTICE GARROW (after setting out the facts, ante p. 483):—The cause of action as disclosed is not, I think, one falling within the class of complaints for the trial of which special provision is made in the Municipal Drainage Act. But the order of reference was not moved against, and moreover appears to have been made by consent, although not stated on its face, so that the decision in *McClure v. Township of Brooke*, 5 A. R. 59, does not apply. And it should also be noted that since that decision the statutes have been further amended. 9 Edw. VII. ch. 78, sec. 2, practically restored R. S. O. (1897) ch. 226, sec. 94, which, at the time of that decision, had been repealed by 1 Edw. VII. ch. 30, sec. 5. This may make it necessary, should the circumstances again arise, to recognize *McClure v. Brooke* in the light of the subsequent statutory changes.

Coming now to what may be called the merits; the facts seem to be very fairly and also with considerable fulness stated in the judgment of the learned Referee. He arrived at the conclusion upon the evidence that the effect of the new bridge built in the year 1907 was to materially narrow the stream, and that such narrowing and the closing up at the same time of the opening at the westerly end of the former bridge through which a large portion of the water flowing in the stream had for years escaped, had caused the flooding of which the plaintiff complains. And the evidence in my opinion amply justifies these findings, although it is quite probable that the extent of the flooding which it is sought to attribute wholly to the defendants' acts is considerably exaggerated.

No by-law for the erection of the bridge was proved, and no expert or other evidence was given to shew any necessity for so constructing a bridge as that its solid approaches

should narrow the channel as this bridge undoubtedly does from about 100 feet to about 65 feet.

The new bridge was, no doubt, required for the purposes of the highway, and if it had been so construed as to leave open the full width of the natural channel, less of course, any necessary piers placed in it for the support of the bridge, including even the closing up of the westerly opening, the plaintiff could not, I think, have successfully complained. What he does complain of, and with justice under the circumstances, is the combination of the two things.

Mr. Rodd contended that the bridge, as it is, is sufficient for all the water which would naturally flow in the stream, and that the flooding of which the plaintiff complains was really due to other water brought into it by a series of artificial ditches and drains up-stream from the bridge, which use the streams as their outlet. And there is no doubt upon the evidence that the water which, in a state of nature, would naturally flow in the stream has been substantially increased by these drainage works. The whole neighbouring territory is very low and flat. A large part of the plaintiff's lands was a marsh in part below lake level until reclaimed as far as it has been by his extensive drainage works which necessarily included an embankment to keep the water out and a pumping arrangement in addition. A running stream is, up to its carrying capacity, a natural outlet for drainage water, and there is, I think, no reliable evidence that if the whole natural width of the banks had been maintained they could not have contained and carried over those additional waters. But, however that may be, it seems to be not a good answer to the plaintiff's complaint to say "our narrowing of the channel would have been quite harmless but for such additional water." These drainage works had all or nearly all been established before the last bridge was built, and their waters were then being carried in the stream past the plaintiff's lands without injury, escaping in part under the old bridge, and in part through the westerly opening before mentioned. The place of the latter as an escape is by no means supplied by the opening at the east side of the new bridge, among other reasons because before the water reaches it, it must all pass through the bridge, whereas the opening at the west end permitted water to escape before it reached the bridge. In the absence of any satisfactory explanation it seems to me to have been a great mistake to close that open-

ing even to save the expense of maintaining an additional bridge over it, which was, I suppose, the real reason for doing so. But as I have said, in effect, the defendant might have been blameless if in closing it they had not also narrowed the channel.

As to the damages, I am inclined to agree with Mr. Rodd, that the case is not one in which there should be recovery as for a permanent injury. The erection complained of is upon the highway, and is wholly under the control of the defendants, and may at any time be so modified or changed as to remove all just cause of complaint. It is not under the circumstances the erection of the bridge which alone gives a cause of action to the plaintiff, but the flooding. And the flooding is not continuous but only occasional. And for each occasion a new right of action would accrue. If there had been a by-law authorizing the erection of the bridge, the plaintiff's proper remedy would, I suppose, have been under the arbitration clauses of the Municipal Act, in which case his damage would have been ascertained and fixed once for all. But there being no by-law, and the defendants objecting, doubtless for good reasons, I think the sum (\$2,000) allowed by the learned Referee under this head cannot stand. See *Darley Main Colliery Co. v. Mitchell*, 11 A. C. 127; *West Leigh Colliery Co. v. Tunncliffe*, [1908] A. C. 27. *Arthur v. Grand Trunk R. Co.*, 22 A. R. 89, in which a contrary conclusion was reached in the case of a railway company permanently interfering with a water course by the construction of their line, is, I think, distinguishable. See also *McGillivray v. Great Western R. Co.*, 25 U. C. R. 69.

The other items of damages all appear to me more or less excessive. The learned Referee made a considerable reduction, but in my opinion by no means enough, especially in the case of two items which I will presently deal with. He assumed to reduce a total of \$4,690 by \$1,690. But the correct total is only \$4,184.90. Included in this is an item in the particulars of \$2,200, which the plaintiff himself says was only intended to be \$1,700. So that making the correction, the total of these items would stand at \$3,684.90. And deducting the \$1,690 taken off by the learned Referee, the result would be \$1,994.90. But the \$2,200 item for loss of 17 acres of tobacco land in 1909, and the one next of loss of 15 acres in the previous year, which is put at \$692, both of which are clearly for estimated future profits upon crops

which were never even sown, are quite too remote and cannot be allowed. Unfortunately, the learned Referee has not in his judgment discussed this question, although the foundation for what in my opinion is the proper measure of such damages is given in the evidence, namely, the annual value of the land. This is placed by the plaintiff himself at the highest at \$10 per acre, for what is called "tobacco land," and for ordinary land \$3 to \$3.50 per acre. The total loss on these two items at \$10 per acre would only be \$320, instead of the enormous sums which the plaintiff claims, and at that sum I think they may with justice to the plaintiff stand.

The other items in the particulars not before dealt with amount in all to \$1,291.90. I do not propose to deal with each of them in detail. I do not, of course, know how much of the total deduction of \$1,690 which the learned Referee made he intended to ascribe to the two items with which I have just dealt. But from what is said in the judgment it may, I think, be assumed that he did not intend the reduction to be wholly confined to them. With this idea I think a proper and indeed a liberal sum to allow in respect of all the remaining items which make up the \$1,291.90 would be \$1,000 or in all with the \$320 for the tobacco lands \$1,320, to which sum the judgment should, in my opinion, be reduced.

And in view of the very substantial relief so afforded to the defendants, to obtain which an appeal was necessary, I think the plaintiff should pay the costs of the appeal, and that the cross-appeal should be dismissed with costs.

HON. MR. JUSTICE MAGEE:—It is manifest that the matters involved are not such as under the Municipal Drainage Act (9 Edw. VII. ch. 8, sec. 1) or 10 Edw. VII. ch. 90, sec. 98, should have been brought in the first place before the Referee appointed under that Act. No petition, report, resolution or by-law relative to drainage is attacked, nor is there any claim or dispute in respect of anything done or required to be done under that Act or consequent thereon or by reason of negligence in any such regard nor was any mandamus or injunction asked in respect of any such matter.

The defendants, however, set up that because, as they alleged, the damage, if any, had in part resulted from the drainage works of other municipalities the High Court of

Justice had no jurisdiction to try the issues. The plaintiff seems to have acquiesced in the propriety of transferring the case to the Drainage Referee, and on his application an order was made evidently by consent as it stated and appears from the correspondence. That order, dated 18th May, 1910, recites that it appears that this action involves the question of drainage, and it directs that the matters in dispute between the parties be transferred for trial by the Referee appointed under the Municipal Drainage Act to be tried pursuant to the provisions of that Act, and all proceedings might be had and taken as if the action had originally been brought under and by virtue of the said Act, and that all costs including the extra costs, if any, occasioned by not bringing the action originally under the provisions of that Act should be in the discretion of the Referee.

Although not properly a claim which should have been brought before the Drainage Referee there is also power under section 99 of the Municipal Drainage Act, 10 Edw. VII. ch. 90 (formerly sec. 93A under 9 Edw. VII. 7 ch. 78 sec. 2) to transfer an action to the Referee if the Court or Judge is of opinion that the same may be more conveniently tried before and disposed of by the Referee. That section provides that the Referee shall thereafter give directions for the continuance of the action before him which shall be as far as practicable in conformity with the provisions of that Act and subject to the order all costs shall be in his discretion.

There is nothing to shew that this power of transference for more convenient trial was not intended to be exercised. The order must now be taken to have been properly made. If the defendant township corporation had merely maintained the bridge and embankments which were contributed to if not constructed by it in 1892 or had merely replaced the bridge with another having as wide an opening for the water I do not think the evidence would have established that any injury would have been caused to the plaintiff's land by obstruction therefrom to the flow of waters naturally passing down Cedar Creek or coming from lands naturally or actually draining into it at the time that bridge was built.

If there would have been any flooding over his dyke it would have owing to what the witnesses call an immense body of water poured into the creek by artificial drains constructed after 1892 from lands some of which at least did

not naturally belong to its watershed and were not riparian to it.

Whether that artificial increase of the waters was right-ful or wrongful the township corporation knowing of it when building the new bridge in 1907 chose to narrow the passage still further and whereas the old bridge had an opening of 70 feet less the width of four or five piles that of the new one was only 62 to 66 feet. Thus except possibly as to ice and logs it aggravated the condition of probable danger to plaintiff and made itself a party to the injury which subsequently resulted to him from the combination and rendered itself liable to him therefor.

The plaintiff had no right to have the passage across the intervening strip of land to the lake which the creek had in 1897 forced for itself below his land and above the bridge kept open by the owner of that strip of land or by the township. And although when the defendant corporation closed that passage in 1907 the natural bed of the stream had to some extent filled up with silt owing probably in part at least to the current being diminished by that forced passage and was in consequence less able to carry off the water, the other cut to the lake which was opened in 1908 immediately below the bridge seems to have fully made up for that and afforded sufficiently free course for the water when once it had passed the bridge. But the real trouble was at the bridge itself and for that the defendants had made themselves liable.

I agree that the plaintiff was not entitled to damages as for permanent injury to or supposed reduction in value of his lands from possible future recurrence of floods or the danger of them from this preventable cause. Indeed the danger of flood from Lake Erie itself during its periods of high water would sufficiently account for any reduced value. I also agree that the other damage assessed should be reduced as indicated by my brother Garrow and that the judgment should be varied accordingly.

DIVISIONAL COURT.

FEBRUARY 20TH, 1912

HOOEY v. TRIPP.

3 O. W. N. 738; O L. R.

*Boundary—Line between two Halves of an Irregularly Shaped Lot—
Action for Trespass—Building Fence—Ascertainment of True
Line—Deflected Line—Frontage—Areas—Value—Equality—
Surveys Act.*

An action by plaintiff claiming \$500 damages for the alleged wrongful entry on his lands by defendant and her servants and the erection thereon of a fence, thereby preventing plaintiff from the use and occupation of a portion of his land. At trial the Judge found that the defendant had trespassed upon the land of plaintiff in building her fence where it was situated and directed that the fence should be removed on to the line shewn in exhibit four and assessed the damages at \$25 and costs of action.

DIVISIONAL COURT *held*, that the Survey Act does not apply to a case of private survey of a lot laid out on a private plan. That the land in dispute should be equally divided between the parties.

Herrick v. Sibby, L. R. 1 P. C. 436, followed.

That both parties had claimed erroneously and therefore no costs should be allowed either party.

MIDDLETON, J., *dissented*, being in favour of dismissing the appeal with costs.

An appeal by the defendant from a judgment of the Hastings County Court, dated 18th December, 1911.

The appeal to Divisional Court was heard by HON. SIR JOHN BOYD, C., HON. MR. JUSTICE LATCHFORD and HON. MR. JUSTICE MIDDLETON.

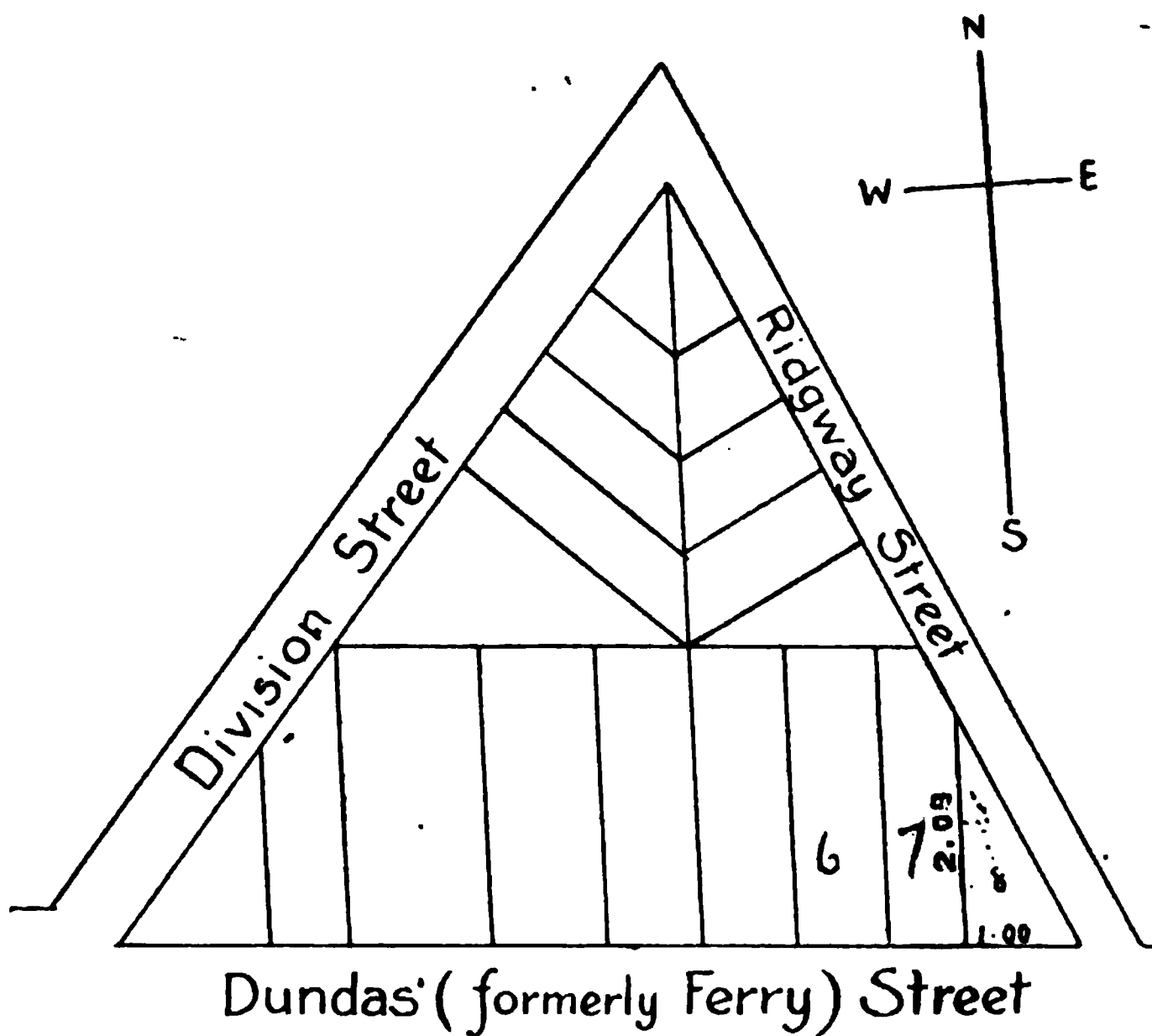
E. Gus. Porter, K.C., for the defendant and appellant.

W. C. Mikel, K.C., for the plaintiff, respondent.

HON. SIR JOHN BOYD, C.:—The lot in question formed part of a triangular shaped piece of land bounded on the south by the principal street of Trenton (Dundas, formerly Ferry Street), by Division St., sloping west and north, and by a narrow and comparatively unimportant street sloping east and north meeting Division St. at the apex of the triangle. One row of lots faces south on Dundas St., a chain in width and about 2 chains deep, except two triangular lots at each end of this front row, and the lot in question, No. 8, which is not a parallelogram, but has a considerable slice

taken off its north-east end by the diagonal trend of Ridgway St. A diagram ("A.") will best illustrate the peculiarities of the situation. Sheriff Proctor owned lot 8; and sold the west half of the lot to Tripp in 1909, and afterwards the east half to Hooey in 1911. The whole dispute is as to the right line of division between these two half lots.

DIAGRAM "A."



Once there was a building facing on the street, but it has been burned down, and the whole lot is now vacant land.

The material words of description are "the west-half of lot 8 on the north side of Dundas St. (formerly Ferry), reserving the right to build upon all the remaining part of the lot . . . according to Evans and Burtyes registered plan."

The other is described as the east-half of lot 8 on the north side of Dundas St. . . . according to the plan mentioned.

A fence was put up by Tripp about the centre of the whole lot, running parallel with the side line to the west between 7 and 8, which would give 462 feet of total area more to Tripp than to Hooey.

The County Court Judge has given effect to a line drawn by a surveyor for the defendant running approximately north and south and parallel with the side line to the west of lot 8 and at right angles with Dundas St., which gives an equal area to each half lot, but on the front gives 56 links to the defendant and only 44 links to the plaintiff.

Both parties, I think, err in their claims; Tripp because his line midway through the lot would not give equal superficial areas to each half, and the plaintiff's (approved by the Judge) while it gives an equal area to each, is not a fair line of division, because it deprives the defendant of some 7 feet of the front on Dundas St., which is the important boundary line by its denomination in the deed, its position, and its value for the practical use of the property as a whole.

There is no reason in law or in fact, why in a lot shaped like this, with a bias or diagonal line on one side, the line of division to separate it into half lots should be run parallel to the side line, which is straight: it may be run partly straight and partly to accommodate itself to the bias or diagonal line formed by the street at the north east side of lot 8.

As far as the side lines of lot 8 beginning from Dundas St. are parallel, I would run the dividing line between the two half lots parallel thereto and bisecting lot 8 so far in equal parts; and then, when this dividing line has reached the point opposite where the diagonal side of lot 8 lying to the east begins, I would deflect the line of division for the two half lots by a right line trending west from the centre of the lot to the northern boundary so as to give an equal area of land in that part of the lot to each half owner (as partly marked in dotted lines on diagram).

This secures an equal division both as to area, as to the main and controlling frontage, and as to comparative advantages, matters which one can regard, on the principle approved in *Skill v. Gloucester*, 16 C. B. N. S. 81. that the Court may consider all material facts existing at the time of the transaction, so as better to appreciate what was being done. I think the equality which the two deeds contemplate is best preserved by giving as far as possible an equal division of the whole lot. That is to say, the width of the lot fronting on Dundas St. is to be equally divided through the width of the whole lot, with the required result of giving each party an equal superficial area. The straight line parallel to both sides from the front on the south part of the lot,

going about two thirds of the whole length of the lot, and the deflected line starting where the parallel line of division ends and going north for the other third part of the lot to the north, which has the diagonal slice taken off to the east, will also effect this equal division. This method of partition by the employment of a middle line of division for two thirds with a partial deflection for the other one third length is justified by the considerations taken into account by the Judges of the Privy Council in *Herrick v. Sixby*, L. R. 1 P. C. 436, at p. 449.

The parcels to be ascertained are the east half and west half of lot 8, and these parcels must have an equal area; that is the prime requisite. Next is to be regarded equality in width in a lot situated as is this one. The equality contemplated by the deeds is best procured in giving equality in these regards to the whole lot as far as possible. By the method now given, about two thirds of the lot (being the southerly part fronting on Dundas St.) will be divided with equal area and equal width to each party, and the remaining one third to the north is divided into equal area but of unequal width. Both equalities cannot be obtained in the rear part owing to the diagonal side of lot 8 and to the prime requirement as to equal area, the other as to equal width must give way. *Herrick v. Sixby*, L. R. 1 P. C. 436, may be consulted as to the best way of grappling with difficulties caused by ambiguous boundaries of land.

The Ontario Surveys Act, R. S. O. ch. 181, does not apply to the manner of dividing a lot laid out on a private plan, and, if it did, it casts no light upon the method of running a dividing line by which an equal aliquot part is to be ascertained.

Both parties claiming erroneously, I think this case should be without costs throughout, including the appeal to this Court.

HON. MR. JUSTICE LATCHFORD:—I have not the slightest doubt that when the defendant's husband obtained the conveyance of the 16th February, 1909, he intended to acquire the westerly 33 feet from the front to rear of the lot in question. His letter to Sheriff Proctor is not in evidence; but the sheriff's reply of the 9th February offers to sell "33 feet off the west side of the lot" for \$1,200. The letter proceed: "The east line, I think, would be about 130 feet, the west line about 150 feet. The north line you are

aware is on the bias. I would expect to leave an alley of about 12 feet on the east side for public use and light for the building which would practically have a thoroughfare on three streets. This lot is situated between the market, the C. O. R. and the post office, and (on) the main business thoroughfare. For the business you suggest there is no other place available in Trenton like it. You could have a first-class restaurant in the basement with your shop above and alley in the rear. I will be pleased to hear from you in regard to you entertaining the idea."

From this it would appear that Tripp desired the property for business purposes, and that, as indicated by his commendation. Proctor was desirous of making a sale. Tripp died in 1910, and the only evidence regarding the conveyance made one week after the sheriff's letter was written, is but such as can properly be afforded by the conveyance itself. The sheriff, who was examined at the trial, does not suggest that he sold to Tripp any property but that mentioned in the letter. The price is different. \$1,100 instead of the \$1,200 first asked. There is a significant reservation in the deed of a right to the grantor "to build on all the remaining part" of the lot. This was unnecessary as a matter of conveyancing. The deed was not, however, prepared by a solicitor, but, it would appear, by the sheriff himself. The only possible, if not indeed the obvious reason for the insertion of the reservation is, that the sheriff felt he might otherwise be bound by the offer in his letter to leave an alley along the east side of the property he had offered to sell to Tripp. The description in the letter was not followed in the deed, which purported to convey "the west half of lot No. 8 on the north side of Dundas (formerly Ferry) Street in the town of Trenton," as shewn on a certain plan, subject to the reservation mentioned.

The plaintiff, as a subsequent purchaser from Proctor of the east half of the same lot, had notice only of the conveyance to Tripp, and asserts that he is entitled to one-half in area of lot No. 8. Owing to the shape of the lot—an irregular pentagon—one-half its area, as divided in the judgment appealed from, would unequally divide the frontage, giving to the plaintiff $36\frac{1}{2}$ feet (56 chains) and to the defendant but $29\frac{1}{2}$ feet (44 chains).

The learned trial Judge has based his decision on sec. 19 of the Surveys Act, R. S. O. ch. 181, now sec. 18 of 1 Geo. V. ch. 42. With deference, I think the Surveys Act has no application. Section 19 in the revision of 1897 is very wide in its language, but it must not be extended beyond the ambit of the Act. It is intimately and indeed expressly connected with secs. 17 & 18. All three sections are in fact included in the single section—35— of the first consolidation of the ordinances and statutes respecting surveys (1849), 12 Vict. ch. 35, and have reference only to boundary lines of concessions, sections; etc., and all side lines and limits of lots surveyed and all trees marked in lieu of posts and all posts and monuments marked, placed, or planted at the front or rear angles of any lots or parcels of land. Under the authority of the executive for the time being. By sec. 18, in force when this transaction took place, "every township . . . lot or parcel of land shall embrace the whole width contained between the front posts, etc., so marked, placed or planted"—that is, marked, placed, or planted under the authority of the Government. Section 19 has reference only to patents, grants, or instruments of an aliquot part of such townships, towns, lots, or parcels, and does not apply to a lot in a sub-division in a part of a township, town, or parcel of land made at the instance of a private owner. The only reported case in which sec. 19 (then sec. 68 of the Consolidated Statutes of Canada 1859) was considered, is *Babaun v. Lauson* (1868), 27 U. C. R. 399. But there the sub-division of a lot as shewn on the original survey of a township was before the Court. Section 19 of the revised statute has not, I am satisfied, nor has section 18 of the revision of 1911, any application to such a plan as is referred to in the deed from Proctor to the plaintiff's predecessor in title. The appeal has, in my opinion, to be considered without assistance from the Surveys Act.

The lot in question fronts on the main business street, and is in the principal business centre of the town of Trenton. In such locations in all our towns and cities, frontage is the most important factor of value. It may be that, according to the strict rules of evidence, a Judge is the only person presumed not to know a fact so notorious. However, in the exceptional circumstances of this case, I should be prepared—were it necessary to go so far—to disregard

such rules rather than sanction by following them an act of injustice, if not of dishonesty. But I am not driven to that extremity. That both Tripp and the plaintiff bought from Sheriff Proctor with reference to the frontage may be inferred from the deed and plan. Dundas St., as shewn upon the plan, does not run east and west. Its bearing is N. 44 degrees 25 E. mag. or N. 41 degrees 51 E. ast. To divide the lot into east and west halves of equal area by a line on the magnetic or astronomical meridian would be absurd. Yet only thus would one party have the east and the other the west half of the lot. One would have all the front, and the other none of it—a manifestly absurd situation. It would therefore appear that all parties gave to the east and west halves a conventional, as distinguished from a literal, meaning. I think effect can be given to the descriptions so interpreted, and at the same time to the cases which decide that half a particular lot means half the area of that lot. This doubly desirable result may be attained by dividing the front by a centre line extending at right angles to Duncan St., for 1.30 chain (or the depth of the north-east side of the lot) and thence continued westerly in such a location as will divide the remainder of the lot into two other equal areas.

There should be judgment accordingly. Success, like the lot, being divided, there should be no costs of the appeal.

HON. MR. JUSTICE MIDDLETON (*dissenting*):—The Surveys Act has no application to this case, nor, in my opinion, does it form any guide to the interpretation to be placed upon the description in the deed.

All the cases cited and many others agree in holding that a conveyance of a particular aliquot portion of a lot is a conveyance of an aliquot portion of the total area of the lot, quite irrespective of any question as to the value of the different parts of the lot. The purchaser of the west half of this lot acquired the west half of the total area. We must interpret the deed, which is quite free from any ambiguity, by the words used, and, in the absence of any claim for reformation, must avoid assuming any intention other than that expressed in the deed. If there has been any mistake, and the deed does not express the intention of the parties, then in a properly constituted action it might be reformed but until reformed we, as well as the parties, are

bound by its terms. I can imagine nothing more dangerous than to depart from the terms of a document in an attempt to give effect to what we imagine must have been the intention of the parties.

If the parties were tenants in common, and our task was to partition the lot, we would be bound to attempt to attain equality in value; but, when the parties have divided the land, not on the basis of equality in value, but of equality in area, and a price has been agreed upon for that which the purchaser receives, I can find no warrant for the introduction of the idea of equality in value.

The parties, no doubt, contemplated a division by a line parallel to the side lines of the lot and at right angles to the front, as the lot is said to be on the north side of Dundas St. To substitute for this a line neither party desires, and having in it an angle, it seems to me, cannot be justified as an admissible interpretation of the deed, no matter how satisfactory a partition it may be, if we start with the assumption that the lot must be divided into halves having equal value and equal area.

I would, however, point out that, if the frontage on Frederick St. has any value, there is no equality in the proposed partition.

The letter referred to by my brother Latchford is not, I venture to think, admissible in evidence; and I cannot see how anything that took place between the parties prior to the conveyance of the west half can be used against the purchaser of the east half, who had no notice, and who has duly registered his deed.

We must assume what was being conveyed and fix the price accordingly; if so, there is no hardship; if not, the remedy is not to be found by departing from the language used in the deed.

I arrive at the same conclusion as the learned County Court Judge, but by another route, and would dismiss the appeal with costs.

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HON. MR. JUSTICE TEETZEL.

MARCH 28TH, 1912.

KENNEDY v. KENNEDY.

3 O. W. N. 924.

Will—Construction—Trust Infringing Rule against Perpetuities.

TEETZEL, J., held, that a bequest to trustees to be used by them to maintain his family residence for two young ladies as long as they lived and for his son and his family and descendants or whomsoever said son might will or otherwise give said residence to, and that as to such residence it should until sold and disposed of, be kept up and maintained by said trustees, and those succeeding them in the trust, in the manner in which it had been kept up and maintained by him, was void as infringing the rule against perpetuities.

Tried at the non-jury sittings at Toronto, on the 5th instant.

J. Bicknell, K.C., and W. A. Baird, for the plaintiff, and for the defendants Robert Kennedy and Joseph H. Kennedy.

E. D. Armour, K.C., and A. D. Armour, for defendant James H. Kennedy.

W. M. Douglas, K.C., for the Suydam Realty Co., and Henry Suydam.

T. P. Galt, K.C., and A. J. R. Snow, K.C., and W. A. Proudfoot, for other defendants.

HON. MR. JUSTICE TEETZEL:—The principal question for determination is whether or not the provision contained in the will of David Kennedy, deceased, is good, or void as creating or tending to create a perpetuity.

The clause containing the provision in question reads as follows:—

“The rest, residue and remainder of my estate both real and personal I give, devise, and bequeath to my executor, executrixes, and trustee aforesaid to be used and employed by

them in their discretion or in the discretion of a majority of them in so far as it may go to the maintenance and keeping up my house and premises herein bequeathed to my son James Harold Kennedy, with full power and authority to them to make sales of any real estate upon such terms and conditions and otherwise as may be expedient and to execute all deeds, documents and other papers necessary for the sale of same and to make title thereto to any purchaser thereof and the proceeds of such sales to devote as in their discretion or in the discretion of a majority of them may seem meet and necessary to keep up and maintain my said residence in the manner in which it has been heretofore kept and maintained, and if for any reason it should be necessary that the said residence should be sold and disposed of I direct upon any such sale being completed that the residuary estate then remaining shall be divided in equal proportions among the several pecuniary legatees under this my will."

This clause and other parts of the will have been the subject of much judicial consideration during the last three years, beginning with *Kennedy v. Kennedy* (1909), 13 O. W. R. 984, and in *Kennedy v. Kennedy* (1911), 24 O. L. R. 183, and *Foxwell v. Kennedy* (1911), 24 O. L. R. 189; the last pronouncement being an unreported judgment of the Chief Justice of the Common Pleas, in January last, in *Foxwell v. Kennedy*, on the counterclaim of the defendants the Suydam Realty Company and Henry Suydam, decreeing in their favour specific performance of a contract for the sale of a portion of the residuary estate in consideration of \$97,000.

By the judgment in *Kennedy v. Kennedy*, 24 O. L. R. 183, it was held by Mr. Justice Latchford that the provisions in the above clause in favour of the pecuniary legatees was void on the ground that it created a perpetuity. This judgment was affirmed by a Divisional Court on p. 189, of the same volume, and a judgment of mine in *Foxwell v. Kennedy*, formally adopting the judgment of my brother Latchford, was affirmed by the Divisional Court in that case at p. 198.

The plaintiff is one of the next of kin of the testator, and in this action claims not only that the gift of what may remain of the residuary estate, but also that the gift in its entirety to the trustees to keep up and maintain the residence of the testator is void as tending to create a perpetuity.

The testator gives his dwelling-house and premises in the city of Toronto, together with the chattels therein or thereon at the time of his decease, except a number specifically bequeathed to the defendant James Harold Kennedy, "but subject nevertheless to the provisions hereinafter made for Gertrude Maude Foxwell and Annie Maud Hamilton."

The will contains similar provisions in favour of these two ladies to the effect that each is given a bed-room suit in a specified room in the house together with the contents and furnishings thereof, with a right to live in said residence as a home as long as she remains unmarried, and to occupy said room with free and full ingress, egress and regress thereto and therefrom, with all other privileges, rights, conditions and conveniences necessary to the full enjoyment thereof, but on no condition is she to be looked upon to do or to be compelled to do any work or have any household duties or responsibilities except to look after her own department, and a right to remove the chattels when she leaves the premises; and his son James Harold Kennedy is to supply her with a key to the front door with all necessary maintenance and board, all which is expressly made a charge upon his residence and premises.

I think it is plain from all the provisions of the will with reference to his residence that the testator's scheme was to have the same maintained as a family residence for those two young ladies as long as they lived and for his son James Harold Kennedy and his family and descendants or whomsoever James Harold Kennedy might will or otherwise give the said residence to, and that as to such residence it should, until sold and disposed of, be kept up and maintained by the trustees and those succeeding them in the trust in the manner in which it had been kept up and maintained by him.

This being, as I think, the scheme which the testator had in his mind, the question for consideration is whether in making the provisions for carrying out that scheme he has not infringed the rule of law against perpetuities.

As the result of the best consideration I have been able to give to the numerous authorities cited by both sides and others, I am of opinion that the gift in question is void as creating or tending to create a perpetuity. I am unable to distinguish it in principle from such cases as *Thomson v. Shakespear* (1860), 1 DeG. F. & J. 399; *Carne v. Long*

(1860), 2 DeG. F. & J. 75; *Yeap Cheah Neo v. Ong Chen Neo* (1875), 6 P. C. 381; and *Richard v. Robson* (1862), 31 Beav. 244

In *Thomson v. Shakespear* the provision of the will analogous to the provision in question was that the testator gave his trustees £2,500 "to be laid out by them as they shall think fit with the concurrence of the trustees of Shakespear's house already sanctioned by me in forming a museum in Shakespear's house in Stratford, and for such other purposes as my said trustees in their discretion shall think fit and desirable for the purpose of giving effect to my wishes."

In that case, as in this, the money was taken out of the estate and was directed to be spent for the maintenance of the premises, and the period over which the expenditure should extend was likewise indefinite and not being for a charity was held to be void as in violation of the rule against perpetuities.

In *Carne v. Long*, the testator gave his Mansion House and premises with the appurtenances thereto belonging, unto the trustees for the time being of the Penzance Public Library to hold to them and to their successors for ever for the use, benefit, maintenance, and support of the said library.

The Lord Chancellor in giving judgment in that case said (p. 79): "My judgment is that it tends to perpetuity . . . The clear intention of the testator, as expressed by the will, is that this should be a gift in perpetuity to this institution at Penzance. The gift is to the trustees for the time being of the society and their successors, to be held by them and their successors forever, they holding it for the use, benefit, maintenance, and support of the library. If the devise had been in favour of the existing members of the society and they had been at liberty to dispose of the property as they might think fit, then it might, I think, have been a lawful disposition and not tending to perpetuity, but looking to the language of the rules of the society it is clear that the library was intended to be a perpetual institution, and the testator must be presumed to have known what the regulations were. By one of these it is provided that the society is not to be broken up so long as ten members remain. The devise therefore is for the benefit of a subsisting society, and one which is intended to subsist as long as ten members remain, and the property comprised in the devise is, therefore, to be taken out of commerce and to become inalien-

able not for a life or lives in being and twenty-one years afterwards, but so long as ten members of the society shall remain. This seems to me a purpose which the law will not sanction, as tending to a perpetuity."

Now in this case the testator in effect says that his trustees shall spend such sums out of his residuary estate as they may deem necessary to keep up and maintain his residence until it is sold and disposed of; and while such keeping up and maintenance is for the benefit of James Harold Kennedy and those who may succeed him as devisees and donees, they have no control over or power of disposition of the residue not appropriated by the trustees to keeping up and maintaining the residence. Nor have they the power upon selling the residence to dispose of any part of the fund set aside for its maintenance.

In the case reported in 6 P. C. at p. 381, "a gift" of the upper story of four specific houses or shops to be occupied by the several members and descendants of K. S. C. and L. K. W., as already proposed" that is, as the context shews, as a family house for the use of two separate families, was held to be void for uncertainty and as denoting an intention to create a perpetuity.

The analogy in this case is not, of course, the giving of this residence for the occupation of the son James Harold and the two ladies, but for its perpetual maintenance or until "it should be necessary that the said residence should be sold and disposed of."

In *Rickard v. Robson* it was held that the bequest of money, the interest of which was to be applied in keeping up the tombs of the testator and his family is void as a perpetuity. It is difficult to draw a distinction between a provision for keeping up a tomb as a resting place of the deceased members of the family and a provision for the indefinite keeping up of a residence as a habitation for the living members of the family. See also *Hoar v. Osborne* (1866), L. R. 1 Eq. 585; *Fowler v. Fowler* (1864), 33 Beav. 616.

In *Re Gassiot* (1901), 70 L. J. n. s. 242, a bequest of £4,000 to the Vintners Company on condition that they accept a bequest of a portrait with certain obligations and enjoining the company of the income of the £4,000 to keep and do in proper repair the portrait, cleaning and regilding its frame not less than once in every four years, the surplus income to be applied for the benefit of individuals answer-

ing to a particular description, etc., was held to be void as infringing the rule against perpetuities.

See also *Re Dutton* (1878), L. R. Ex. 54.

I think the general proposition of law to be drawn from the above cases is that any gift not being charitable the object of which is to tie up property for an indefinite time is void.

It seems to me that there can be no question in this case as to the indefiniteness of the time during which the residuary estate was to be tied up, inasmuch as many generations of owners may continue to occupy the residence before the happening of the event upon which further expenditures are to cease, i.e., when it shall "be necessary that the said residence should be sold and disposed of."

Nor do I think that upon a fair interpretation of the testator's language it can be held that the residue, except such as in the honest discretion of the trustees is necessary to expend for up-keep and maintenance of the residence according to the standard fixed by the testator, is not tied up and taken from commerce, within the meaning of the authorities. Neither the owners of the residence nor the trustees have any right to dispose of the fund for any other purpose. The trustees are bound to hold the whole fund for the purpose of the up-keep and maintenance until the happening of the event, when according to the testator's wish the residue was to be distributed among his pecuniary legatees, and I cannot conceive how the fact that because it has been held that the testator's wish in that regard has been defeated by reason of his language contravening the law, any advantage therefrom is to accrue to the owner of the residence.

I am unable to yield to the argument by Mr. Armour, that, because the trust is in its nature imperative and the amount to be expended is left to the discretion of the trustees, they can at once appropriate the whole fund regardless of the amount thereof or of the necessities for expenditures, for the benefit of the present owner as by his deed poll (Exhibit 4) the defendant James H. Kennedy, the owner and sole trustee, has attempted to do. Like any other trust it must be executed in good faith, and the Court will exercise its control to prevent a dishonest exercise of discretion. Whether or not the defendant James H. Kennedy in the exercise of his discretion as evidenced by the deed poll has acted honestly, I am unable upon the evidence to say, because

the actual amount of the fund in his hands or the necessities for upkeep and maintenance was not disclosed in evidence before me, so that if it should be held that my judgment as to the total invalidity of the gift is not maintained, the plaintiff and other next of kin should be at liberty in another action, if so advised, to contest the good faith of James H. Kennedy in the exercise of the discretion as evidenced by deed poll.

The whole estate was charged with the payment of an annuity of \$400 to the plaintiff, and he claims that the lands embraced in the residuary gift cannot be sold except subject to that charge. In view of the wide power of sale vested in the trustees it is, I think, perfectly plain that they may make title to the purchaser free from the charge, but the proceeds will be charged with the annuity.

At the trial I dismissed the action as against the defendants Suydam and the Suydam Realty Company, but reserved the question of costs. I now think that there is no good reason why the plaintiff should not pay them.

The judgment will, therefore, be:—

(1) Declaring that the gift of the residue is void as creating a perpetuity, and that the lands embraced therein may be sold free from plaintiff's annuity, declaring that the proceeds of the sale are charged therewith, and that as to the whole residuary gift there is an intestacy, reserving to the plaintiff and other next of kin, in the event of it being held that my judgment is wrong, the right to impeach in another action the good faith of the defendant James H. Kennedy in the exercise of his discretion as evidenced by the deed poll.

(2) That the action be dismissed with costs as against the defendant Suydam and the Suydam Realty Company; and

(3) Except as to those costs, the costs of all parties shall be paid out of the residuary estate.

Thirty days' stay except as against the defendants, the Suydams.

MASTER IN CHAMBERS.

MARCH 28TH, 1912.

TAYLOR v. TORONTO CONSTRUCTION CO.

3 O. W. N. 930.

*Venue—Change—Hamilton to Guelph—Motion by Plaintiff for —
Motion Really made to Correct Possible Oversight in not Serving
Notice of Trial in Time Required.*

MASTER-IN-CHAMBERS, *held*, that which cannot be done directly cannot be done indirectly. Motion dismissed. Costs to defendants in any event.

This action was commenced on 18th January, 1912.

The plaintiff seeks to recover \$22,000 on the basis of two contracts made with the defendant company—or in the alternative to recover almost \$10,000 on a *quantum meruit*. Appearance was entered on 26th January.

The statement of claim was delivered on 19th February and statement of defence and counterclaim, so-called, on 27th February.

Issue was joined on 15th March, which was the last day for giving notice of trial for the Hamilton sittings, commencing on the 25th. For some reason notice of trial was not given until the 16th.

The plaintiff now moved to change the venue from Hamilton to Guelph so that the action might be tried there on 9th April prox.

F. Morison, for the plaintiffs motion.

W. C. Chisholm, K.C., for the defendant, contra.

CARTWRIGHT, K.C., MASTER:—The motion is made really to correct if possible the oversight in not serving the notice of trial in the time required by the Rules. But that which cannot be done directly cannot be done indirectly.

It is strongly urged that it is most important to the plaintiff to have a speedy trial on two grounds. His affidavit states that four of his witnesses are obliged to go to Western Canada about the end of April, and cannot remain until the June sittings at Hamilton. There is no mention of their names nor the nature of their evidence. But in a proper case this difficulty can be met by having their evidence taken *de bene esse*, and an order can issue for that purpose as may be arranged.

The second ground is that plaintiff is a poor man whose means have all been used in doing the work in question. He now wishes to be free to go to New Brunswick where he has obtained another contract since this action was commenced.

The statement of defence alleges that plaintiff had been paid over \$14,000 up to the time when he abandoned the work which was over \$1,600 in excess of what had been earned; that the defendants had to take the work over and complete same which has not been done, but at the end of January this left \$1,817.93 overpaid by defendants in excess of the contract price. They claim to be allowed this sum, and also whatever sum (as yet not capable of being ascertained) shall have been overpaid when the work is completed.

The affidavit of the president of the defendant company confirms these statements which seem to shew that the whole matter could not be disposed of as early as 9th April.

If the notice of trial had been given in time then it might have been possible to have sent the trial to some other place as Guelph or Milton or Toronto non-jury sittings as most agreeable to the parties. But I am not aware of any case in which a motion by plaintiff to change the venue so as to expedite the trial and correct his own mistake has been successful—none such was cited on the argument nor is any found in H. & L. under Rule 529—It seems a necessary inference that the power to do so does not exist.

The defendant's president in his affidavit states that they will move to strike out the jury notice. If they succeed in this, as seems most probable, the case can be tried in June at Hamilton, or even entered at Toronto, if both parties agree.

As it is the motion must be dismissed with costs to the defendants in any event.

HON. MR. JUSTICE LATCHFORD.

MARCH 28TH, 1912.

PLAUNT v. GILLIES BROS. LTD.

3 O. W. N. 921.

Arbitration and Award—Injunction—Motion for Restraining Arbitrator from Acting—Ground Bias—His Employers Directly and Pecuniarily Interested in the Result of the Litigation—Motion by Consent Turned into Motion for Judgment on whole Case.

LATCHFORD, J., *held*, that plaintiff's objections to the arbitrator had been met and overcome by the evidence. That on the facts plaintiff's case failed. Judgment for defendants with costs.

Motion in Weekly Court at Ottawa for an injunction restraining the defendant John Burwash from acting as arbitrator in certain arbitration proceedings between the plaintiff and the defendants Gillies Bros. Ltd., issued pursuant to the Saw-Logs Driving Act, R. S. O. (1897) ch. 143.

Upon the return of the motion the parties consented that it should be treated as a motion for judgment upon the whole case.

W. L. Scott, for the plaintiff.

R. V. Sinclair, K.C., for defendants.

HON. MR. JUSTICE LATCHFORD:—The plaintiff and the defendants Gillies Bros. Ltd., are lumbermen who during the season of 1911 operated upon the Madawaska river. The plaintiff was bringing down telegraph poles, and Gillies Bros. Ltd. were bringing down railway ties. The progress of the telegraph poles, was, it appears, slower than that of the ties, and, the Gillies Brothers refusing to assist in a joint drive, the plaintiff was, as he alleges, obliged to drive the Gillies Brothers' ties with his telegraph poles, thus greatly delaying his drive and entailing upon him expense which he now desires to have settled by arbitration.

Gillies Bros. Ltd., first proposed as their arbitrator Mr. H. F. McLachlin, of Ottawa, lumber merchant; but objection was made by the plaintiff to Mr. McLachlin, on the ground that Mr. McLachlin was largely interested in McLachlin Brothers Limited, a company which had been concerned for many years in driving the Madawaska river in conjunction with Gillies Brothers. Mr. McLachlin, however, objected to serve, owing, as he stated, to his business engagements. Gillies Brothers then formally appointed Mr. John Burwash, of Arnprior, as their arbitrator.

It appears that Mr. Burwash is the woods manager for McLachlin Brothers. Objection is therefore taken to his appointment, on the ground that his employers are directly and pecuniarily interested in the result of the litigation, and that he will be biased against the plaintiff's claim and incapable of fairly trying the matters in question in this arbitration and of making a fair award between the parties.

The contention that Burwash's employers have any direct or pecuniary interest in the result of the arbitration is in my opinion met and overcome by the evidence before

me. It is also shewn that they and Gillies Brothers have not driven the Madawaska on joint account for three years, and that the McLachlin Brothers Limited have not driven the river at all for two years. It is shewn beyond question that Mr. Burwash is a man of great experience in the lumbering business. He has been engaged in it for over forty years, and has during that period had charge of the driving of logs and timber on the Madawaska and other rivers, and is therefore familiar with the conditions which would have to be dealt with by the arbitrators. He deposes that he can be perfectly independent and that he is capable of trying the matter in question fairly and without bias or prejudice. He is well known to be a man of high character; and, as the matter was presented to me upon the argument, while he does not desire to take part in the arbitration, he considers that to abandon the position to which he was appointed would be an admission of his unfitness for it.

A number of authorities were cited to me regarding the duties of an arbitrator and umpire. It is manifest that he ought to be a person who stands indifferently between the parties. Beyond the fact that the employers of Burwash have had business relations in the past with the defendants, there is no suggestion here which would tend in the slightest degree to shew that Mr. Burwash has any bias unfitting him for the position of arbitrator.

It is urged that a distinction must be drawn between the freedom from bias required in an arbitrator chosen by the parties themselves—"an agreed arbitrator"—and that necessary in persons to whom the parties are obliged ex necessitate to have recourse. In cases of decisions by judicial tribunals any direct pecuniary interest, however small, disqualifies. Blackburn, J., in *Regina v. Rand* (1866), L. R. 1 Q. B. 230, shews there is another cause. He says (p. 233):—

"Wherever there is a real likelihood that the Judge would from kindred or other cause have bias in favour of one of the parties it would be very wrong for him to act."

In *Eckersley v. Mersea Docks*, [1894] 2 Q. B. 667, Lord Esher is reported to have said (p. 671):—

"Persons ought not to act as Judges in a matter in which the circumstances are such that people—not necessarily reasonable people, but many people—would suspect them of being biased."

This is regarded as extending the rule far beyond the principles stated in *Regina v. Rand*, *Regina v. Dean of Rochester* (1851), 17 Q. B. 1, and *Regina v. Meyers*, 1 Q. B. D. 173. Vaughan Williams, L.J., in *Rex v. Southend Justices*, [1901] states that mere possibility or suspicion that a Judge may be biased is not sufficient to disqualify him. Lord O'Brien, also, speaking for the King's Bench Division of Ireland in *Rex v. Justice Co. Tyrone*, [1909] 2 Ir. R. 763, comments adversely on the supposed rule laid down by Lord Esher. He says:—

“That in my opinion goes too far. It makes the mere suspicion of unreasonable persons the test of bias. I think that the judgment was not a considered one and that Lord Esher made use of some loose expressions. We decline on a consideration of the cases to go so far as that very eminent Judge. There must, in the words of Blackburn, J., be a ‘real likelihood’ of bias. *Regina v. Rand*. In *Rex v. Justices of Queen's Co.*, [1908] 2 Ir. R. 285, at 294, I expressed myself as follows: ‘By ‘bias’ I understand a real likelihood of an operative prejudice. There must, in my opinion, be reasonable evidence to satisfy us that there was a real likelihood of bias.’”

To the same effect is the decision of the same Court in *Rex v. Justices of Tyrone*, [1909] 2 Ir. R. 763.

To disqualify a Judge or Justice, there must exist a reasonable likelihood of a bias which would affect his mind in deciding between the parties. In *Vineberg v. The Guardian Assce. Co.* (1890), 19 A. R. 293, an arbitrator who was a sub-agent of the agent of the defendant company was held disqualified. Mr. Justice Rose, in *Christie v. Toronto Junction* (1894), 24 O. R. 443, states that the Vineberg case probably goes the farthest of any that can be cited, and that it is difficult to distinguish it from the case then before him, in which one of the arbitrators had from time to time advised as counsel the standing solicitor for the defendant corporation. But that learned Judge did draw a distinction, and held (p. 445) that there was not such a relation between the arbitrator and the corporation as might give rise to bias or that should fairly lay the arbitrator open to observation.

The plaintiff's case fails, and I direct that judgment be entered for defendants with costs.

As to the costs of the application made before the issue of the writ for the removal of the arbitrator—when no order could be made owing to want of jurisdiction—they also must be paid by the plaintiff. Notwithstanding that an application fails on the ground that the Court has no jurisdiction to give the relief sought, the unsuccessful party may nevertheless be ordered to pay the costs of the proceeding. Con. Rule 1130, Holmsted & Langton's Jud. Act, p. 1339.

MASTER IN CHAMBERS.

MARCH 27TH, 1912.

IMRIE v. WILSON.

3 O. W. N. 929.

Discovery — Motion by Defendant for Production of Documents — Plaintiff Claimed Privilege — Documents Confidential — Motion Dismissed with Costs to Plaintiff in any Event.

In obedience to the order made herein on 20th inst., the plaintiffs have filed a further and better affidavit on production. With this the defendant is not satisfied and moves for production of the documents set out therein for which privilege is claimed.

F. Arnoldi, K.C., for the defendant's motion.

J. R. Roaf, for the plaintiff, contra.

CARTWRIGHT, K.C. MASTER:—The material parts of the affidavit in question are as follows:—

We, Robert Imrie, William Graham and Herbert Stinson all of the city of Toronto, in the county of York, make oath and say as follows:—

(1) We have in our possession or power the documents relating to the matters in question in this action set forth in the first and second parts of the first schedule hereto.

(2) We object to produce the said documents set forth in the second part of the said first schedule hereto.

(3) That we object to produce the said documents set forth in the second part of the said first schedule hereto on the ground that the said correspondence between the plaintiffs Imrie and Graham was had after consultation with the solicitor acting for us in this action and on his instructions

and was for the purpose of obtaining further advice and information in relation to the litigation now proceeding in this action and in view of such litigation and was had and obtained for the purpose of the facts and information being laid before our said solicitor as our professional adviser in view of this litigation and to obtain his advice and the said letters contain some of the evidence and names of witnesses and the said letters with the exception of the original of that dated 15th of February, 1912, were on receipt placed in the hands of our solicitor for his information and to obtain his advice thereon in relation to the now pending litigation in this action and we believe he still has the same.

The first schedule to affidavit of Robert Imrie, William Graham and Herbert Stinson;

The first part thereof shewing documents in our possession which we do not object to produce.

1. Copy letter J. R. Roaf to J. M. Wilson, dated 31st Jan., 1912.
2. Copy of account of Imrie & Graham with J. M. Wilson, dated 31st Jan., 1912.
3. Copy letter J. R. Roaf to J. M. Wilson, dated 2nd Feb., 1912.
4. Copy letter J. R. Roaf to J. M. Wilson, dated 6th Feb., 1912.
5. Letter Arnoldi & Grierson to J. R. Roaf, dated 6th Feb., 1912.
6. Copy letter J. R. Roaf to Arnoldi & Grierson, dated 7th Feb., 1912.
7. Letter Arnoldi & Grierson to J. R. Roaf, dated 7th Feb., 1912.
8. Copy letter J. R. Roaf to Arnoldi & Grierson, dated 7th Feb., 1912.
9. Letter Arnoldi & Grierson to J. R. Roaf, dated 7th Feb., 1912.

(Sgd.) Clive A. Thompson,
A Commr., &c.

The second part shewing documents in our possession which we object to produce:—

11. Letter R. Imrie to William Graham, dated Feb. 2nd, 1912.
12. Letter R. Imrie to William Graham, dated Feb. 9th, 1912.
13. Letter R. Imrie to William Graham, dated Feb. 12th, 1912.
14. Copy letter William Graham to Robt. Imprie, dated Feb. 15th, 1912.
15. Letter R. Imrie to William Graham, dated Feb. 27th, 1912.

It was contended that clause (3) was not sufficient to sustain a claim of privilege. It was said that it was defective for not stating that the documents in part two of schedule one were "confidential."

But to this I cannot accede.

In Bray's Digest of the Law of Discovery, p. 13, sec. 50, it is said that the true principle is stated by Cotton, L.J., in *Southwark Co. v. Quick*, 3 Q. B. D. 315. At p. 34 the same learned author says that this case shews that; "the true principle is that if a document comes into existence

for the purpose of being communicated to the solicitor with the object of obtaining his advice or of enabling him either to prosecute or defend an action then it is privileged it need not have been prepared at the instance or request of the solicitor, or have been laid before him."

The present action was begun on 9th February and part 1 shews that there was a *lis mota* as early as 31st January. The affidavit seems to me correctly framed. It sufficiently states the facts necessary to shew that the documents in part 2 are confidential, i.e., protected from discovery—and the motion will be dismissed with costs to plaintiffs in any event.

(The judgment in the Southwark case was given by Mellor and Manisty, JJ., and affirmed by Bramwell, Brett, and Cotton, L.JJ.)

MASTER IN CHAMBERS.

MARCH 27TH, 1912.

WHITE v. WHITE.

3 O. W. N. 929.

Husband and Wife—Alimony—Motion for Interim and Disbursements—Plaintiff Left with Care of Three Children who Inherited Consumption from Father—Father Apparently Dying of Consumption—Being Cared for by His Parents—Attempts at Settlement Failed in Spite of Efforts of Legal Advisers—Master-in-Chambers made Order for Payment of \$40 for Interim Disbursements so Case May be Tried—Plaintiff in Possession of More than One-fifth of Husband's Income—Prevents any Further Allowance at Present.

Motion by the plaintiff for interim alimony and disbursements.

Edward Gillis, for the plaintiff's motion.

M. H. Ludwig, K.C., for the defendant, contra.

CARTWRIGHT, K.C., MASTER:—This is one of the most deplorable cases of the kind that I have met with during the past nine years.

The plaintiff moves for the usual order for interim alimony and disbursements. She is left with the care of 3 children who are said to have inherited the delicacy of their father, who is apparently dying of consumption, and is being taken care of by his parents.

All attempts at settlement have failed in spite of the efforts of the legal advisors of both litigants. On the facts as developed on the material, it does not seem that any other order can be made than for payment of \$40 for interim disbursements so that the case can be tried. This can be paid out of the \$300 still due on sale of some property of defendant's.

The plaintiff appears to be in possession of more than a fifth of the husband's income—which seems to prevent any further allowance at present. See *Lush Law of Husband and Wife*, 3rd ed. 184—and *Capstick v. Capstick*, L. J (N. S.), vol. 33. Matrimonial Cases and Statutes shew that in same cases where the husband has neither property nor earning power the Court will not award interim alimony pendente lite. Here the husband is not only unable to work, but is being cared for by his parents, while the plaintiff occupies the store and has whatever income is derived from the business which he carried on. It is alleged by defendant's father that plaintiff also gets \$12.50 a month as rent of another adjoining store on Yonge street. The affidavit of plaintiff in reply does not meet this directly (if at all). She speaks of a house on Erskine of which the rent of \$10 a month is apparently in her opinion, being received by the defendant's family. The affidavits on both sides are somewhat lengthy but do not always make their meaning clear.

I regret that there does not seem any way of speedy relief to plaintiff unless even now some arrangement can be arrived at. No doubt this will yet be done if the parties will follow the advice of their counsel.

DIVISIONAL COURT.

MARCH 8TH, 1912.

RICH v. MELANCTHON BOARD OF HEALTH.

3 O. W. N. 828.

Medicine and Surgery—Public Health Board—Physician Employed by Local Board — Action to Recover for Services in County Court—No Jurisdiction—Prerogative Writ of Mandamus.

DIVISIONAL COURT, *held*, that a Board of Health is not a corporation, and cannot be sued as such, nor are the members thereof individually liable to be sued for the recovery of claims for medical services rendered at the instance of the Board, as for a private debt.

The proper remedy is against the Board as a public body, by seeking a writ of mandamus requiring the Board to issue an order upon the municipality for the amount of the claim in order that payment may be made out of the funds applicable thereto.

The prerogative writ of mandamus can only be issued by the High Court—in no circumstances has County Courts any jurisdiction over mandatory orders.

An appeal by the plaintiff from a judgment of Dufferin County Court in favour of the defendants in an action by a physician to recover \$30 for services performed under the direction of the Board of Health of the township of Melancthon. Plaintiff sought a personal judgment against the members of the Board and a mandatory order to enforce the judgment.

The appeal to Divisional Court was heard by HON. SIR JOHN BOYD, C., HON. MR. JUSTICE LATCHFORD, and HON. MR. JUSTICE MIDDLETON.

W. H. Harris, for the plaintiff, appellant.

W. C. Chisholm, K.C., for the respondent Board.

HON. SIR JOHN BOYD, C.:—This is an unfortunate bit of litigation for the plaintiff. He is entitled to be paid \$30 for his medical services rendered at the instance of the Board of Health, but cannot recover it by this method. The miscarriage is not to be wondered at, considering the state of the case and the vague and rather embarrassing clauses of the Board of Health Act, which invite, and are, I understand, about to receive clarifying amendments: R. S. O. ch. 248.

It is now pretty well settled that the members of the Board are not constituted a corporation, though they have

been judicially spoken of as a quasi-corporation; and it is also settled that the Board as a whole is not personally liable nor are the component members thereof individually liable to be sued for the recovery of medical claims as for a private debt. The remedy is to be sought against the Board as a public body, if payment cannot be otherwise obtained—by seeking the grant of a writ of mandamus requiring the Board to issue an order upon the municipality for the amount of the claim in order that payment may be made out of the funds applicable thereto.

The writ is the high prerogative writ, so called, available in cases where there is no right of action for the recovery of the claim and relief is to be sought against a public body who fail to perform statutory or other public duties imposed upon that body, for the benefit of the applicant. This plaintiff by his pleading seeks a personal judgment for the amount, and also asks for a mandatory order to enforce it, and for that purpose sues the public body under the name of the Board of Health for the township. The personal judgment he cannot get, and for this reason he cannot get the mandatory order. Nor could he in any circumstances get the mandatory order of the character required from an inferior Court, such as the County Court. The prerogative writ of mandamus which is the appropriate method of relief can only be issued by the High Court. Originally confined to the King's Bench alone, it may now be issued by any of the divisions of the High Court, as was explained in *Public Library Board v. Toronto* (1900), 19 P. R. 332.

The case of *Bibby v. Davis* (1902), 1 O. W. R. 189, which may have misled the plaintiff, is not now to be followed in the light of later decisions: *Sellars v. Dutton*, 7 O. L. R. 648; *Ross v. London*, 20 O. L. R. affirmed in appeal, 23 O. L. R. See also as to the writ *Kingston v. Kingston*, 28 O. R. 402, and in appeal (1898), 25 A. R. 468.

There is an inherent lack of jurisdiction in the County Court to deal with this claim, but the matter was not contested on the line above indicated on the appeal before us. We are all in the dark as to what took place on the trial below; the only judgment given being that the action is dismissed with costs. This curt disposal of appealable cases has often been commented upon as unfair to the suitors and to the Court of Appeal. When reasons are given for the judgment it enables the dissatisfied litigant to judge whether he shall

appeal or not, and these reasons are a material assistance to the appellate Court. In brief, when reasons for the judgment exist, they should be given; when they are not given, it may be that the rule "*de non apparentibus*," etc., will excuse.

The defendants raised an issue disputing the claim which was vexatious and did not take the vital point on which we decide; so that, while the appeal is disallowed, we think the proper order to make is to dismiss both action and appeal without costs.

This is to be without prejudice to the plaintiff prosecuting his claim as he shall be advised—if the municipality does not provide means for payment.

HON. MR. JUSTICE LATCHFORD:—I agree.

HON. MR. JUSTICE MIDDLETON:—I agree with my lord the Chancellor, and only desire to add to what he has said, for the purpose of explaining more at length the reason why I think that an action for a mandamus or a mandatory order is not the proper or a permissible remedy. Some confusion has arisen from a failure to keep in mind the historical origin of the present jurisdiction of the High Court and by reason of the term "*mandamus*" being used to indicate several distinct things.

The Court of Chancery always had jurisdiction to enforce certain rights by means of a mandatory injunction as well as by specific performance. Prior to the Common Law Procedure Act the Courts of law had no such power.

The Court of King's Bench, as one of the Crown prerogatives, had the right to issue the prerogative writ of mandamus. The scope of this writ was very widely different from the mandatory order in equity.

The Common Law Commissioners of 1834 reported in favour of an amendment by which the Courts of Law should be given the same jurisdiction as the Court of Equity to restrain the violation of legal rights in cases in which an injunction might issue for that purpose from Courts of Equity. Following this, the Common Law Procedure Act of 1854 provided that a plaintiff at law might claim a writ of mandamus "*commanding the defendant to fulfil any duty in the fulfilment of which the plaintiff is personally interested.*" This writ was to have the same force and effect as

the peremptory writ issued out of the Queen's Bench. This statute was subsequently enacted here, and in its present form is found as Con. Rules 1081-1083.

One of the cardinal principles governing the issue of the prerogative writ was that it would never be granted where the applicant had some other remedy open to him. After the passing of the Common Law Procedure Act it was suggested that the power conferred upon the Court to award a mandamus in an action practically superseded and rendered obsolete the peremptory writ. In *Regina v. Lambourn Rv. Co.*, 22 Q. B. R. 463, it was said by Pollock, B., that "since the passing of this Act it cannot be said that the plaintiff has no specific remedy to enforce the right which he says has been denied to him;" and by Manisty, J., "in 1854 a remedy which did not exist before was given by the Legislature, viz., an action for mandamus which is in fact a decree ordering the performance of the duty which the Court thinks ought to be done, and is a more convenient proceeding than by the prerogative writ."

This view of the effect of the statute has not been generally accepted; and in *Smith v. Chorley*, [1897] 1 Q. B. 532, Kennedy, J., collects the subsequent decisions in which it has been commented upon, and adopts as a more accurate statement of the law that found in *Baxter v. London County Council*, 63 L. T. n. s. at 771, where Day, J., says:—

"The true and only remedy which the plaintiff had for the purpose of enforcing the right which I am of the opinion he has got is by a prerogative writ of mandamus. When I objected that this was a matter for mandamus I was answered that this was an action for a mandamus. It is an action for a mandamus, based upon the Common Law Procedure Act 1854, and the action for a mandamus is simply an attempt to engraft upon the old common law remedy a right in the nature of specific performance. When private persons had rights one against the other, the Court had power to grant a mandamus or direct specific performance or something in the nature of an injunction, to command that the right claimed by the one party should be acceded to by the other; but it was never contemplated that the action for a mandamus was to supersede the prerogative writ of mandamus. In this case no action will lie. I am perfectly clear that this is not an action which will lie between the parties or a case in which a statutable mandamus will be applicable, because no action

would lie, and a mandamus is only granted as ancillary to the action and for the purpose of enforcing the private right in respect of which the private litigation had arisen. It was never contemplated that a private mandamus should be granted in cases in which a prerogative mandamus had, from time whereof memory does not run to the contrary, been alone the effective remedy."

This is quite in accordance with the view taken in other cases by other Judges. In *Glossop v. Heston*, 12 C. D. 102, at 122, Brett, L.J., speaking of the mandamus referred to in the section of the Judicature Act corresponding with C. J. A., sec. 58, sub-sec. 59—which provides that "a mandamus or an injunction may be granted . . . in all cases in which it shall appear to the Court to be just and convenient"—says that the case before him "is not brought within a rule that would enable the Court of Chancery to grant a mandatory injunction. It is said that nevertheless the defendants are liable to a mandamus to do their duty. Now, supposing they had neglected or refused to do their duty, then I think they would have been liable to a mandamus, but not to a mandamus to be granted by the Chancery Division. It would have been a prerogative mandamus, as it is called, to them as a public body to enter upon and do their duty. That, as it seems to me, under the Judicature Act as it was before, is a remedy that can be granted only in the Court of Queen's Bench. I think the mandamus spoken of in the Judicature Act is not the prerogative mandamus but only a mandamus which may be granted to direct the performance of some act, of something to be done, which is the result of an action where an action will lie."

In the case already quoted, Kennedy, J., deals with the series of cases in which an action for mandamus had been successfully brought against public bodies, by stating that they are all cases where there was a debt and "in which the relief by mandamus might properly be termed ancillary relief."

The cases in our own Courts dealing with the right of a physician employed by a local Board of Health, shew there is no debt. The situation is analogous to that existing in *King v. Beeston*, 3 T. R. at 592, where a mandamus was issued against the churchwardens and overseers directing payment of a sum payable out of certain parish funds, upon a contract which the parish overseers had made under a

statutory power. The churchwardens not being "technically a corporation, but as far as concerned the regulation of the poor of the parish they stand in *pari ratione*." Upon the same principle it is said in *Mayor of Salford v. Lancashire*, 25 Q. B. D. 384, that an action for mandamus would not lie, because there was no debt, and the plaintiff's only remedy was by the peremptory writ of mandamus.

Under our practice, the peremptory writ of mandamus having been superseded by the simple procedure of C. R. 1091, the "convenience" urged in some of the English cases in favour of the action of mandamus disappears. Apart from this, the great weight of modern authority is in favour of the view I have indicated, that the mandamus which may be awarded in an action is either in the nature of the old equitable mandatory injunction or is merely ancillary to the enforcement of a legal right for which an action might be maintained at law.

It should also be borne in mind that the County Court has no jurisdiction to grant a peremptory writ. While the Consolidated Rules govern the practice and procedure in County Court actions, they do not confer any jurisdiction upon the County Court. The jurisdiction of the County Court must be sought in the County Courts Act; and while the County Court has jurisdiction in actions for equitable relief where the subject matter does not exceed five hundred dollars, and while it has "as regards all causes of action within its jurisdiction . . . power to grant . . . such relief, redress or remedy . . . by the same mode of procedure in as full and ample a manner as might and ought to be done in the like case before the High Court," it has not the right to entertain an application for the old prerogative writ, this being vested in the High Court only.

MASTER IN CHAMBERS.

MARCH 20TH, 1912.

NEY v. NEY (No. 1.)

3 O. W. N. 896.

Husband and Wife—Alienation of Husband's Affections—Pleading—Statement of Claim—Con. Rule 261.

CARTWRIGHT, K.C., *held*, that no action lies by a married woman for loss of *consortium* of her husband.

Weston v. Perry, 14 O. W. R. 956 and

Lellis v. Lambert, 24 A. R. 653, followed.

But the right to support from him in such an event is not taken away.

This action is brought by the plaintiff against her husband, her husband's father, and another defendant Reyburn.

The plaintiff alleged a conspiracy of these three defendants to break up her home and deprive her of the custody of her two infant children.

She claimed damages "by reason of the misconduct of the defendants and for breaking up the domestic relations existing between the plaintiff and the defendant John Ney," her husband.

The defendants the Neys moved to strike out pars. 6, 7, 8, 9 and 10 of the statement of claim as embarrassing.

T. N. Phelan, for the defendants' motion.

W. J. McLarty, for the plaintiff, contra.

CARTWRIGHT, K.C. MASTER:—The motion is supported by *Weston v. Perry*, 14 O. W. R. 956, and *Lellis v. Lambert*, 24 A. R. 653. These judgments seem to support Mr. Phelan's contention that no action will lie by a married woman for the loss of the *consortium* of her husband. Her right to support from him in such an event is not taken away.

I am confronted with the difficulty that to give effect to this motion would be equivalent to a judgment under Rule 261, as the paragraphs attacked are the whole substance of the plaintiff's claim.

It would therefore seem best in the interests of all parties either to strike out the paragraphs in question and give the plaintiff leave to amend as advised or else refer the motion to a Judge in Chambers who can enlarge it into Court and deal with it under Rule 261. The defendants will elect within a week which course they prefer.

MASTER IN CHAMBERS.

MARCH 22ND, 1912.

NEY v. NEY (No. 2).

3 O. W. N. 927.

*Action—Joinder of Causes—Action for Alimony against Husband—
Action against Husband and his Father for Custody of Children
—Habeas Corpus.*

MASTER-IN-CHAMBERS, *held*, that two separate causes of action in one of which one of the defendants has no concern cannot be joined.

Hinds v. Barrie, 6 O. L. R. 656, followed.

The plaintiff should amend by discontinuing, as against the father and continuing the action for alimony against the husband. In that action she could claim the custody of the children.

Quære, if a mother seeks possession of her children from any one except her husband, should she not proceed to get out a writ of *habeas corpus*? Is not this the appropriate remedy?

This action was brought by plaintiff against her husband and his father. She asked for alimony as against the husband and for the custody of the two children of the marriage as against both defendants. They moved to require her to elect on which branch she would proceed in this action and to strike out some parts of the statement of claim.

T. N. Phelan, for the defendants' motion.

W. J. McLarty, for the plaintiff, contra.

CARTWRIGHT, K.C., MASTER:—The motion is entitled to prevail with costs to defendants only in the cause. Two separate causes of action in one of which one of the defendants has no concern, cannot be joined, *Hinds v. Barrie*, 6 O. L. R. 656, and cases there cited. The plaintiff should amend. This can best be done by discontinuing as against the father and continuing the action for alimony against the husband. In that action she can claim the custody of the children. This would be given her in a proper case as in *Cowie v. Cowie*, 13 O. W. R. 599. Paragraph 5 would then be amended. Paragraph 6 may stand under the decision in *Millington v. Loring*, 6 Q. B. D. 190. It gives defendant notice of what plaintiff will prove at the trial. Paragraph 13 and clause 2 of par. 14, should also be amended. If these amendments are made promptly the action can be tried at the non-jury sittings before vacation.

If a mother seeks possession of her children from anyone except her husband, should she not proceed to get out a writ of *habeas corpus*? Is not this the appropriate remedy?

HON. MR. JUSTICE LATCHFORD.

MARCH 22ND, 1912.

WOLFE v. HOLLAND.

3 O. W. N. 900.

Vendor and Purchaser—Objection to Title—Motion under Act for Declaration that Objections had been Answered.

LATCHFORD, J., *held*, that where testator left his property to his wife to share with the children at her death as she thought fit, the widow took but a life estate with power of appointment among the children, and could not make a title in fee.

Motion under the Vendors and Purchasers Act, for a declaration that the objection of the purchaser to the title of certain lands in Ottawa, on the grounds (1) that the description contained in the conveyance under which the vendors held title had not contained the proper or legal description of the said lands; (2) that the will of the late August Bauer did not transfer the absolute estate in fee simple to his widow Charlotte Bauer, one of the predecessors in title of the vendors is invalid.

W. C. Greig, for the vendors.

W. Greene, for the purchaser.

A. C. T. Lewis, for the Official Guardian.

HON. MR. JUSTICE LATCHFORD:—The first ground I disposed of on the argument, by holding the description sufficient.

I reserved for consideration the second ground of objection, although I expressed at the time the opinion that the widow had but a life estate. August Bauer, the owner in his lifetime of the lands in question, made his will shortly before his death in 1898, in the following words:—

“I leave my property to my wife too share with the childring at her death, as she thinks fit.”

The will was duly attested; and the widow in March, 1909, took out letters of administration with the will annexed, and, assuming that she was absolutely entitled to the lands in fee simple, executed a conveyance in fee to the vendors, who in turn have contracted to sell to the purchaser.

It is contended on the part of the vendors that under the will in question the children took no interest, and that the conveyance which they have received from Mrs. Bauer vests in them the fee.

I am quite unable to adopt this view. The gift to the testator's wife is in effect like that considered in *Burrell v. Burrell* (1778), 1 Ambl. 660. There the testator gave all his property to his wife, to the end that she might give her children such fortunes as she thought proper or as they best deserved. The case came before the Court upon a question as to whether the power had been properly exercised by the widow, who had given a merely nominal sum to one of the children; but nowhere was it suggested that the widow was absolutely entitled.

In the present case Bauer imposed an obligation upon his widow to share with or among his children at her death the same property which he gave to her. She took but a life estate, with power of apportionment among the children. She could not convey to the vendors more than she received under the will, and the vendors are unable to convey in fee to the purchaser.

There will be judgment accordingly. Costs payable by vendors.

HON. MR. JUSTICE MIDDLETON. FEBRUARY 19TH, 1912.

HON. MR. JUSTICE SUTHERLAND. MARCH 22ND, 1912.

GILROY v. CONN.

3 O. W. N. 732, 899.

Execution—Judgment Debtor Entitled to Legacy—Share of Residuary Estate—Garnishee Proceedings—Estate not Wound up—No Certainty that any Sum would ever be Payable to Judgment Debtor—Judgment Creditor Appointed Receiver.

MIDDLETON, J., *held*, that before an order for payment could be made the Court must find some definite sum either as presently due, when it is to be paid forthwith, or, as a debt payable at a future date: Con. Rule 915 then authorizes an order for payment when the sum so ascertained becomes payable.

LOCAL JUDGE at Sarnia granted order appointing the judgment creditor as receiver, without remuneration, and without security, of any and all legacies to which the judgment debtor is or may be entitled under said will, to the extent of his judgment and costs.

SUTHERLAND, J., continued above order.

An appeal by the garnishees from an order of the local Judge at Sarnia, dated 5th December, 1911, by which upon the return of the garnishee order nisi he directed the garnishees to pay the judgment creditor "the debt due from

them to the judgment debtor as soon as it becomes payable under and in pursuance of the last will and testament of Meredith Conn, deceased."

F. E. Hodgins, K.C., for garnishees.

W. D. McPherson, K.C., for judgment creditor.

No one for the judgment debtor.

HON. MR. JUSTICE MIDDLETON:—The alleged debt to the garnishees of the judgment debtor is his right as one of the residuary legatees of the late Meredith Conn, to receive a share of the residue of the estate.

The estate is not yet wound up, and it is by no means certain that any sum will ever be payable to the judgment debtor. It is alleged that he was indebted to the deceased in a sum far exceeding the amount of any possible share in the residue. The judgment debtor admits this indebtedness; but the judgment creditor suggests that this admission is fraudulent and collusive and for the purpose of defeating his right, and that there is not in truth any indebtedness to the deceased.

It is not at all clear whether the local Judge intended to pass upon this question. It may be that by the order he merely intended to direct the payment by the garnishees to the judgment creditor of any balance which might ultimately be payable to the judgment debtor, as and when the same should be ascertained and become payable. But, however, this may be, it is clear that the judgment creditor has entirely mistaken his remedy. Under the rule as it now stands—Consolidated Rule 911—the judgment creditor by garnishee process is enabled to reach "all debts owing or accruing" from the garnishee to his debtor.

The claim of a residuary legatee against the executors is not a debt—*Deeks v. Strutt*, 5 T. R. 690; *Jones v. Tanner*, 7 B. & C. 542—though if the executor admits to the legatee that he holds any specific sum to the debtor's use—or, as it is sometimes put, "assents to the legacy"—the legatee might recover upon the common *indebitatus* count at law *Topham v. Morecraft*, 8 E. & B. 972.

Reliance was placed upon the case of *McLean v. Bruce*, 14 P. R. 190; but that case was decided under the Rules of 1888, where under Rule 935, the attaching creditor could by this process make exigible not only debts, but "all claims . .

arising out of trust or contract where such claims and demands could be made available under equitable execution"—a provision long since omitted from the rules.

The case of *Hunsberry v. Kratz*, 5 O. L. R. 635, relied upon by the garnishee, is in accordance with this view, although it turned upon the provision of the Division Courts Act, relating to the attachment of debts.

It is also to be pointed out that under the practice there is no authority for a vague and undefined order such as made in this case. Before an order for payment can be made the Court must find some definite sum either as presently due when it is to be paid forthwith or as a debt payable at a future date; Rule 915 then authorizes an order for payment when the sum so ascertained becomes payable.

The appeal must be allowed and the order vacated, with costs to be paid by the judgment creditor to the garnishees, both here and below, upon taxation.

Motion by the judgment creditor to continue an injunction granted by the local Judge at Sarnia, under an order, dated 26th February, 1912.

W. D. McPherson, K.C., for the plaintiff.

C. H. Gamble, K.C., for the defendant.

F. E. Hodgins, K.C., for executors.

HON. MR. JUSTICE SUTHERLAND:—The applicant is a judgment creditor, and the defendant, a judgment debtor, is said to be entitled to a legacy under the will of his father, Meredith Conn, deceased. The said order restrains the defendant from dealing in any way with the said legacy and appoints the plaintiff receiver thereof. Upon the facts disclosed in the material filed in support of the application, I think the plaintiff is entitled to an order continuing him as receiver. I, therefore, order and direct that he be continued as receiver without remuneration and without security, of any and all legacies to which the defendant is or may be entitled under the will of the said Meredith Conn, deceased, to the extent of the plaintiff's judgment and costs including the costs of the application for the said order, and of this application, and which costs when taxed the plaintiff shall be at liberty to add to his claim.

The plaintiff directed the notice of motion herein to the executors of the estate of Meredith Conn, deceased, as well as to the defendant. I do not think it was necessary for him to have done so for the purposes he had in view upon the application. Having been notified I think the executors were warranted in being represented on the motion to state their position in the matter and protect the interest of the estate.

It appears from the affidavit of one of the executors of said estate that it is claimed by them that the defendant owes the estate \$1,500 and interest, which if set off against his claim with respect to the legacy would more than exhaust it. Under these circumstances and in the light of this claim on the part of the estate, of which the plaintiff had knowledge before serving his notice of motion herein, he asks therein that he be also appointed to contest for the defendant any right the executors of said estate may assert on behalf of the estate, to set off any such alleged claim of the estate against the defendant's legacy. I think the plaintiff is entitled to be so appointed, and do order and direct accordingly. Before so contesting the claim he must first indemnify the defendant against costs.

It is said that the defendant is a non-resident and that upon this application I should direct that in case the plaintiff sees fit to so contest the said claim against the estate of the defendant, he should be directed to first give security for costs. I do not think it necessary nor appropriate to make such an order at this time. I am not at all disposing of the matter finally, or precluding the estate from, or prejudicing it in making a future application for that purpose in case the executors should be so advised and it becomes necessary.

The plaintiff will have his costs of the motion as aforesaid. The estate will have costs against the plaintiff, but limited to the costs of a formal attendance upon the application.

DIVISIONAL COURT.

FEBRUARY 16TH, 1912.

CONTRACTORS SUPPLY CO. v. HYDE.

3 O. W. N. 723.

Building Contract — Extras—Claim for—Architect's Certificate — Arbitration—Reference back to Referee to Ascertain Amount due Contractors—Costs.

Action by contractors for moneys claimed to be due on a building contract. Official Referee found that the contractors were bound by certificates of the architects, and that if they had any claim for extras it should be determined by arbitration.

DIVISIONAL COURT allowed appeal from above order and referred the matter back to the Referee to hear the evidence and to ascertain the sum due the contractors under their contract and for extras.

Costs of the appeal to be in the cause, but the costs which were lost or occasioned by the refusal of the Referee to allow the contractors to prove their claim in the usual way should be paid by the owner in any event.

An appeal by the defendants Hyde & Powell, contractors, from an order of J. A. C. Cameron, an Official Referee, in a proceeding under the Mechanics' Lien Act, between the appellants and the defendants, the News Publishing Company.

The appeal to Divisional Court was heard by HON. SIR WM. MEREDITH, C.J.C.P., HON. MR. JUSTICE TEETZEL, and HON. MR. JUSTICE MIDDLETON.

G. H. Kilmer, K.C., for the appellants.

M. H. Ludwig, K.C., for the News Pub. Co.

Their Lordships' judgment was delivered by

HON. MR. JUSTICE MIDDLETON:—By contract of 20th August, 1910, Hyde & Powell agreed with The News Publishing Company to do the reinforced concrete and brickwork required in the erection of a certain building for \$8,587. This building was for a newspaper office and press rooms.

The plans did not shew a press pit, and on 30th September, 1910, Hyde & Powell tendered for the construction of a press pit at the price of \$1,100. This tender was accepted on 6th October.

The contract of 20th August, is in a printed form in general use, and contains the usual provision by which the

architect is given extensive powers and his certificate is made final—and a condition precedent to any action.

The tender of September 30th, contains no reference to this contract by which it can be said to expressly import its terms so as to make them govern the new work.

The Referee has treated the contract of August as governing the entire work. No reasons are given by him. The contract provides "Should the proprietor or their (sic) architects at any time during the progress of the said works require any alterations of or deviations from additions to or omissions in the said plans and specifications, they shall have the right and power to make such change or changes, and the same shall in no wise effect (sic) or make void the contract . . . and for additional work required in alterations the amount to be paid thereof (sic) shall be agreed upon before commencing additions," etc.

It is argued that the press pit either was an "addition" to the original work or that the parties have chosen to treat it as an "addition" within the meaning of the contract—and in that view the tender and acceptance are to be regarded as a supplemental agreement by which the price was ascertained.

This view is fortified by the fact that the contract provides that the agreement for additional work shall "state also the extension of time (if any), which is to be granted by reason thereof." This tender says: "It is understood that we would start work at once, using a separate gang from the building gang and our tender-price included the shifting of our plant in order to allow this work to go on, and in this way making it possible to have the press erected without any delay on account of the building being a little behind time."

The conduct of the parties shews that this tender and acceptance were not regarded as constituting the whole bargain, because the work went on under the supervision of the architect, and his certificate was obtained.

Beyond this, I can see no reason why, in circumstances such as these, the same rule that has frequently been applied between landlord and tenant, when a new term is arranged for, should not be applied here. The common sense of the transaction would appear to be that, although there may have been a new contract, its terms must have been understood to be that, save as varied and expressly provided, all was to go

on as under the old contract. See *Phillips v. Miller*, L. R. 10 C. B. 423; *Doe dem. Mouck v. Geikie*, 5 Q. B. 841.

I am aware of the reluctance the Court has, when asked to imply terms in a written contract; but, I think, the case falls within the rule laid down by Kay, L.J., in *Hamlyn v. Wood*, [1891] 2 Q. B. 494, and adopted by the Privy Council in *Douglass v. Baynes*, [1908] A. C. 482: "The Court ought not to imply a term in a contract unless there arises from the language of the contract itself, and the circumstances under which it was entered into, such an inference that the parties must have intended the stipulation in question that the Court is driven to the conclusion that it must be implied."

The contract provides that any dispute as to extras or reductions after the architect's certificate shall be referred to arbitration. The Referee has determined that the claim of the contractors for extras must be determined by an arbitration under this clause; and, as no arbitrators have been appointed, has adjourned the hearing until arbitrators have been appointed and an award made.

This cannot be supported. A clause in an agreement providing for an arbitration cannot be invoked save in the manner provided in sec. 8 of the Arbitration Act (9 Edw. VII. ch. 35), by a motion to stay made after appearance and before defence, and before taking any other step. This order was made at the hearing, when the contractor was present and endeavouring to prove his claim.

The course adopted by the learned Referee of preventing the contractor from presenting his claim in his own way and of himself calling the architect and allowing him to be examined by counsel for the owner, before the contractor had given any evidence in support of his claim, is most unusual and quite unwarranted.

An argument presented at the hearing should not be left unnoticed. It was suggested that the architect's certificate was final, unless varied by the arbitration contemplated by clause 6, and, therefore, that a reference back would not be of any real value to the appellant. A study of the contract has convinced me that this is not so.

The contract is very peculiar in its terms, and does not contain the usual provisions relating to the finality of the architect's findings as evidenced by his certificate; and it perhaps might create embarrassment to discuss the terms of the contract in detail at this stage. No certificate was here

given until long after the litigation had been on foot; and, whatever the true meaning of the contract in the circumstances of this case, there is a right to recover what "is justly due" under the contract and for extras, without either a certificate or an arbitration. The amount "justly due" must be ascertained by the Referee upon the evidence when given.

The appeal should be allowed, and the matter should be referred back to the Referee to hear the evidence and to ascertain the sum due the contractors under the contract and for extras. The costs of the appeal should be in the cause, but the costs which are lost or occasioned by the refusal of the Referee to allow the contractors to prove their claim in the usual way should be paid by the owner in any event.

DIVISIONAL COURT.

FEBRUARY 16TH, 1912.

RE WEST NISSOURI CONTINUATION SCHOOL.

3 O. W. N. 726; O. L. R.

Schools — Continuation Schools — Authority of School Board and Municipal Council—Right of Council to Review Action of Board.

MIDDLETON, J. (20 O. W. R. 841; 3 O. W. N. 478) granted a mandamus compelling a township council to raise \$7,000 and pay the same to the school treasurer, or, to issue debentures for this amount under a by-law, holding that the school board is supreme and independent of the council in matters within its jurisdiction, and the council has no authority to review the action of the board, to protect ratepayers from the action of that board.

DIVISIONAL COURT, *held*, that it was the duty of the council to provide the \$7,000, yet mandamus did not lie because a formal demand must first be made and a refusal received.

Regina v. Bodmin, [1892] 2 Q. B. 21, followed.

Appeal allowed without prejudice to another application after formal demand had been made.

An appeal by the municipality from an order of HON. MR. JUSTICE MIDDLETON, 20 O. W. R. 841, 3 O. W. N. 478.

The appeal to Divisional Court was heard by HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B., HON. MR. JUSTICE BRITTON, and HON. MR. JUSTICE RIDDELL.

Sir Geo. Gibbons, K.C., and G. S. Gibbons, for motion.

T. G. Meredith, K.C., and W. R. Meredith, contra.

HON. MR. JUSTICE RIDDELL:—The County Council of the county of Middlesex, January 27th, 1910, under the Continuation Schools Act, 9 Edw. VII., ch. 90, sec. 5, established the whole township of West Nissouri, a continuation school district. There was much opposition to this in the township—and a motion was made to quash a by-law of the township passed 1st June, 1910, based upon the resolution. The motion failed; Middleton, J., dismissed it (1910), 23 O. L. R., at p. 22; that judgment was affirmed by the Divisional Court, 23 O. L. R. 25, and the Court of Appeal, 24 O. L. R. 517, September 29th, 1911. Application was made to the Supreme Court for leave to appeal, and leave was refused.

The township by-law referred to, viz., By-law No. 208, recited: "And whereas the municipal council of the township of West Nissouri have approved of the application or requisition for the said moneys"—this referring to a previous recital: "Whereas a requisition has been made by" the township of West Nissouri Continuation School-board "for the issue of \$7,000 debentures for the purchase of a school site and the erection of a school-house for the township of West Nissouri continuation school. The by-law No. 208 provided for raising \$7,000 by debentures of not less than \$100 each, payable in 20 years after day upon which the by-law took effect and interest payable yearly at 5 per cent., coupons to be attached for that purpose—the by-law to take effect December 15th, 1910.

The proceedings resulting in the by-law were, of course, passed under the provisions of 9 Edw. VII. 90, sec. 38, which provides for an application by the Board, and (3) that the council shall, at its first meeting after receiving the application or as soon thereafter as possible, consider and approve or disapprove the same. It is abundantly manifest that the council did approve the application; and, had no motion been made to quash the by-law, no doubt the money would have been raised and paid over to the school board.

After judgment had been given in the Divisional Court, and while an appeal was pending to the Court of Appeal, the township council, July 20th, 1911, passed by-law No. 216, reciting the proceedings in the Courts, and that "the majority of the ratepayers of the township of West Nissouri are desirous of having submitted to them the desirability of issuing debentures for the purpose of purchasing a site and erecting a school-house for the continuation school in the

said township"—then proceeded to repeal by-law No. 208. This was because the reeve and most of the council believed that they were elected on the issue raised at the election of opposing the establishment of a continuation school. I can see no impropriety in raising such an issue at the municipal election, or in making the attitude of a candidate upon that issue a test or the test of whether he should be voted for. The people were to pay for a school, if established, and they had a right to express their views by their votes if they saw fit. More than one provincial election has been lost and won on Dominion issues. And the council have a perfect right to do all they could lawfully to carry out the mandate of their constituents.

But, as the legislature gave the power to the council to approve or disapprove only "at its first meeting after receiving the application, or as soon thereafter as possible," it is obvious that once the council had approved (as it undoubtedly did in June 1910), no power was left in the council which would enable it to change or reverse that approval. Accordingly by-law No. 216 does not affect the approval.

The approval having occurred, sec. 28 (4) applies, and it became the duty of the council to "raise the sum required by the issue of debentures in the manner provided by the Consolidated Municipal Act 1903."

All parties are agreed that the council is blameless in not raising this money until the motion made to quash by-law 208 was finally disposed of, about October or November, 1911.

But on March 20th, 1911, a document under the seal of the school board and signed by the chairman and secretary-treasurer, was served upon the council in the following terms:—

"To the Municipal Council of the Township of West Nissouri. The Trustees of the West Nissouri Continuation School board require of you the sum of \$1,000, on account for the sum applied for for maintenance, dated 15th day of March, 1911. In witness whereof, etc., etc., etc."

On the 27th March, by a similarly executed document, the school board notified the council "that they withdraw that portion of their claim submitted in their estimate on the 20th day of March, being the issue of \$500 demanded for equipment, including library, chemical, and physical apparatus." Nothing turns upon this withdrawal, as it refers to

an item specifically for library, etc., in the estimates—the whole estimates for maintenance and permanent improvements being \$3,570.

Nothing was done on the demand, and on April 5th the chairman and others of the board attended a meeting of the council and urged the council to raise and pay over the money to the board, as the board intended to open a school at once, and it was necessary that they should have funds in order to carry on their work. They were informed by the reeve in presence of the council that the matter should be referred to the township solicitor for advice. It is sworn and not disputed that the \$1,000 was required for the purpose of the school, and in order that the school should be started.

Subsequently and on May 3rd a member of the school board appeared for the board at a meeting of the council and "demanded from them that they should pay to the school board the moneys required by the board under their written requisition, and I was told by the reeve in the presence of the Court, that we could go to the Courts and get our money." I written by the solicitors for the board to the members council, April 7th and April 15th, demanding the payment of the \$1,000. No answer was given to these letters, so far as appears.

Finally a motion was launched by the board for a mandamus to compel the township to pay the board the \$1,000—this was apparently abandoned, as the applicant did not appear on the return; and the Chancellor made an order, June 16th, dismissing it with costs, but without prejudice to a renewal of the application. The motion was reinstated by the Chief Justice of the Common Pleas, June 22nd; it came on for hearing October 20th, but was enlarged pending application in *Henderson v. West Nissouri* to the Supreme Court for leave to appeal. Notice was served 6th December for a renewal of the motion—and it finally came before my brother Middleton, who ordered the council to pay the amount. See 20 O. W. R. pp. 843, 844. One branch of the appeal is from this order.

After the Court of Appeal had, September 29th, disposed of the appeal in the Henderson case from the Divisional Court, two members of the school board on October 6th, 1911, attended a meeting of the council and "requested the council to pass a debenture by-law for the purpose of raising

\$7,000 required for the school board for the purpose of the school building and property," but were told by the reeve that they had no official notice of the decision of the Court of Appeal on the motion to quash the debenture by-law passed previously, and that they would have to consider the matter for 30 days." It does not anywhere appear that these two had been appointed by the school board, that they represented or purported to represent the school board, or that the school board had in fact determined to press for the \$7,000. So, too, at the meeting of the council, 29th November, 1911, one, Wentworth McGuffin, attended the council and "requested them on behalf of the West Nissouri Continuation School Board to pay to the treasurer of the school board the sum of \$1,000, for the maintenance of the school and the sum of \$7,000 or the proceeds of the debentures to be issued to build the school house, but I was told by the reeve and other councillors that we had no by-law and by one of the councillors . . . that the matter would have to be laid over for consideration . . ." No resolution or official or other act of the school board is adduced to shew any authority in McGuffin, even if he be the same McGuffin who in the previous June describes himself as a member of the West Nissouri Continuation School Board. Nothing was done by the council, and, on December 6th, 1911, a notice of motion was served for a mandamus "directing the corporation of the township of West Nissouri . . . and the reeve and councillors . . . to raise the sum of \$7,000 by the issue of debentures in the manner provided by the Municipal Act 1903, and to pay the same to the treasurer of the West Nissouri Continuation School Board or to issue the debentures provided for under by-law 248 . . . and to pay the proceeds . . . to the treasurer of the West Nissouri Continuation School Board or for such further or other order as may be just."

This motion came on along with the other before my brother Middleton, and he made an order as asked, 20 O. W. R. pp. 841, sqq. And an appeal is also taken from this order.

As to the first appeal, the formal order provides that the township do forthwith pay to the treasurer of the board the sum of \$1,000, as required by the board for maintenance of the school in pursuance of 9 Edw. VII. chs. 90 and 91.

I can see no ground for interfering with this disposition of the matter. The statute is plain, 9 Edw. VII. ch. 91, sec. 37: the demand was official and sufficient, and while the council may well have been justified in neglecting to comply with the demand until the last Court had given its decision, there was no excuse after this decision. There may indeed have been no official refusal, no specific refusal in words, but "it is not necessary that there should have been a refusal in so many words:" *Littledale, J., in Regina v. Brecknock* (1835), 3 A. & E. 217, at p. 223: "All that is necessary that a mandamus may issue is to satisfy the Court that the person complained of has distinctly determined not to do what is demanded:" *Halsbury's Laws of England*, vol. 10, p. 101, sec. 199. "There should be enough to shew that the party withholds compliance and distinctly determines not to do what is required:" per Lord Denman, C.P., in *Regina v. Brecknock, etc., Canal Co.* (1835), 3 A. & E. 217, at pp. 222, 223. See also *Rex v. Ford*, 2 A. & E. 588.

"No rule can be laid down for determining whether there has been a refusal or not; it is a waste of time to cite former decisions on the subject as if the want of some one circumstance which existed in a former case would decide this:" Lord Denman, C.J., in *Rex v. Conservators of Thames*, 8 A. & E. 904.

I think it must be abundantly manifest from all the circumstances that the council "had distinctly determined not to do what is demanded." And, although the township seems to have no money, there need be no difficulty in procuring enough for the purpose.

This appeal must be dismissed.

As to the other appeal, there are different considerations. Our law does not, like the law in some at least of the American States, make a distinction between duties of a private nature and those which affect the public at large. In the law of these States, while in the former class of cases a demand and refusal are a condition precedent to relief by mandamus, in the latter the law itself stands in lieu of the demand and the omission to perform the required duty in place of a refusal: *Short on Informations, etc.*, p. 249; *High on Extraordinary Remedies*, pp. 17, 18. But in our law, where the extraordinary remedy by mandamus is

sought, the applicant must be *rectus in curia*, he must have made a demand and received a refusal.

I do not think that there was any request by the school board shewn—two individual members of the board did indeed demand, but not on behalf of the board—while McGuffin, the farmer who asked on November 29th, 1911, does not adduce or pretend to any authority from the school board. It was the school board which was interested in the application, and I do not think the kind of demand made is sufficient. A formal demand would in all probability have been of no use; but in proceedings such as these the demand seems to be necessary.

While I agree that it was the duty of the council to provide the \$7,000, I do not think *mandamus* lies. But, while the appeal should be allowed, the dismissal of the motion for *mandamus* will be without prejudice to another application after formal demand so as to avoid the very stringent rule laid down in *Regina v. Bodmin*, [1892] 2 Q. B. 21.

Counsel for the township said at the hearing, that if a proper demand were made the township would accede to the demand—so that it may be that another application will be unnecessary.

As the appeal succeeds in part, I think there should be no costs of the appeal; but that in the proceedings below costs should follow the event in each case.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.—I agree.

HON. MR. JUSTICE BRITTON.—I agree that the appeal in regard to the application for a *mandamus* as to the \$7,000 should be allowed, and that the appeal as to the \$1,000 should be dismissed. There should be no costs of these appeals to either party. The township of West Nissouri should get costs in the proceedings below for the *mandamus* as to the \$7,000, and the trustees of the West Nissouri Continuation School should get costs in the proceedings below for a *mandamus* as to the \$1,000.

This case differs materially in the facts from *Re Medora School Section No. 4*, reported 23 O. L. R. 523.

I adhere to the dissenting opinion expressed by me in that case as to the exercise of judicial discretion in granting a *mandamus* as between school and municipal corporations.

DIVISIONAL COURT.

FEBRUARY 17TH, 1912

DOMINION FLOUR MILLS CO. v. MORRIS.

3 O. W. N. 729; O. L. R. .

*Trade Mark—Unregistered—"Gold Medal" Flour—Infringement
—Right to Use Non-descriptive Words as Mark—No Evidence
of Fraud or Passing off.*

An action by manufacturers, to prevent defendants selling flour with the mark or brand "Gold Medal," or any other combination or marks or words so contrived as to represent the marks or brands used by plaintiffs, etc.

DIVISIONAL COURT, *held*, that plaintiffs had failed to prove that defendants had sought to palm off his flour as the flour of the plaintiffs. Non-descriptive words are not proper trade marks. Appeal and action dismissed with costs.

An appeal by the plaintiffs from a judgment of HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B., of November 24th, 1911, dismissing their action for alleged infringement of their unregistered trade mark, which had been used by the plaintiffs for many years.

The appeal to Divisional Court was heard by HON SIR JOHN BOYD, C., HON. MR. JUSTICE LATCHFORD and HON. MR. JUSTICE MIDDLETON.

W. S. McBrayne, Hamilton, for plaintiffs.

G. Lynch-Staunton, K.C., and W. M. McClemon, Hamilton, for the defendants.

Their Lordships' judgment was delivered by

HON. SIR JOHN BOYD, C.—This is a case of alleged passing off goods by the sale of flour in bags impressed with a trade mark (unregistered) which it is said is used by the defendants to the plaintiffs' detriment. The words used which are complained of are "Gold Medal" and as the mark is not registered, the onus is on the plaintiffs to shew that the defendants have been attempting to sell and have been selling the bags of flour they deal in as those made by the plaintiffs. The plaintiffs are millers and manufacture this brand of flour at Hamilton; the defendants are dealers in flour, wholesale and retail, and sell flour manufactured at

Caledonia in bags stamped with the same words as are found on the plaintiffs' bags, i.e., "Gold Medal."

And next the onus is on the plaintiffs to shew that the term "Gold Medal" has acquired, as used by the plaintiffs, a secondary meaning, denoting their flour only.

The words "Gold Medal" are ordinary words capable of a well understood meaning, and are applicable to articles which have gained a prize at some exhibition or competition. They are in no way descriptive of flour, nor could they properly be used as a trade mark if they are misdescriptive and misleading, in this sense, that the flour of the plaintiffs never had the "Gold Medal" awarded to it.

But, apart from this aspect of the case, suppose a legitimate use of the words, it lies upon the plaintiffs to prove that these merely descriptive words (implying success at some exhibition) have acquired a technical and superinduced meaning distinct from the natural one and applicable only to this particular flour. That is the proposition to be established, and it must be so by convincing evidence. Whereas here it is in evidence that the words "Gold Medal" are applied to flour all over the country (although the only maker who has heretofore supplied Hamilton under that name appears to be the plaintiffs).

The reasons against allowing an exclusive expropriation (so to speak) of the words "Gold Medal" to a particular kind of flour are more cogent than in the case of simply descriptive words. As to the latter class of words, I quote from Lord Shand: "If a person employing a word or term of well known signification and in ordinary use . . . is yet able to acquire the right to appropriate a word or term in ordinary use in the English language to describe his goods, and to shut others out from the use of this descriptive term, he would really acquire a right more valuable than either a patent or a trade mark. . . . That being so, it appears to me that the utmost difficulty should be put in the way of anyone who seeks to adopt and use exclusively as his own a merely descriptive term:" *Cellular Clothing Co. v. Maxton & Murray*, [1899] A. C. 326, at pp. 339, 340.

The origin of these words "Gold Medal" in reference to flour is not as clear as might be in the evidence, but the use did not originate with the plaintiffs or their predecessors. It came from the United States and spread since 1880 over many parts of Ontario. The evidence would lead

me to say that it came to be used as a synonym for excellence. It was first applied to flour from Ontario wheat, but afterwards as the trade developed, it came to be applied to a mixture of Ontario and Manitoba wheat. It came to mean an excellent blended flour of these components. Any good miller would know how to make a good blend—say 40 parts of Manitoba to 60 parts of Ontario product. But there was no standard or settled rule and as made by the plaintiffs, there were from year to year variations depending on the season, the yield, and the price. Various grades of the Manitoba wheat were used by the plaintiffs and their predecessors and all sold in bags stamped “Gold Medal” and sold all along in other parts of the Province the same blend was sold in bags having impressed the same words. In brief, the words were used as a vague euphemistic term serviceable as a sort of catch-word with the public, but of no significance as meaning the flour made by the plaintiffs any more than that made all over the country (outside of Hamilton).

In passing off cases it is not essential that fraud should be proved in case it appears that there is an intention to sell one man's goods as and for another's. The language in *Lee v. Haley* (1869), L. R. 5 Ch. 155, cited by the Chief Justice appears to be open to some modification in this respect (see judgment of Lord Westbury in *Leather Cloth Co. v. American Leather Cloth Co.* (1863), 4 De G. J. & Sm. 137, affirmed in same case (1865), 11 H. L. C. 522). But it is a matter of almost controlling significance if there is an absence of direct evidence to shew that anyone has been deceived. I would again quote from Lord Shand's judgment a significant sentence which he commends from the judgment of Lord Kyllachy: “I do not myself remember a case in which the use of a merely descriptive name has been interdicted as deceptive, unless in circumstances which truly involved fraud on the part of the user:” [1899] A. C., at p. 341. In the case in hand there is no evidence that anyone was deceived by the defendants' use of the words, nor that any confusion had arisen or was likely to arise by purchasers of flour. Barring the use of the words in common (“Gold Medal”) everything else in the defendants' advertisements and labels and bags appealing to the eye is clearly and distinctly different from those used by the plaintiffs. The defendants have made no attempt to deceive the public, or, if they have so attempted, no attempt has been made

to shew it in evidence. The plaintiffs' trade may be affected by the defendants' business, but not more so than will arise from fair and ordinary competition.

The whole situation is cleared by what is said as to the source of the paper bags which held the flour. These have been prepared at the Lincoln Mills Paper Co.'s mills, stamped with the brand "Gold Medal" as far back as 1885, before the plaintiffs' predecessors were in the field, and these bags were supplied indiscriminately throughout Ontario. The company had a stock block with these words on and various people would buy the bags so stamped without any name of flour-maker on. It was considered a stock pattern when so turned out without any name beyond "Gold Medal" on. Then if makers' names were to be put on the company would so arrange and differentiate the printing so that one would not interfere with another. Supplies of bags made up with makers' names were furnished in this way to Lake & Bailey in earlier years, under whom the plaintiffs claim, as well as to the defendants in later years. This method of supplying and obtaining paper and other bags stamped "Gold Medal" takes all the point out of the supposed attempt to interfere illicitly with the plaintiffs' trade. The plaintiffs' suit is a vain attempt to impose a tertiary meaning on "Gold Medal" importing the particular blend of the plaintiffs' flour sold at Hamilton, and so exclude all competitors selling mixed wheat flour from the benefits of Hamilton trade. It is impossible thus to insulate Hamilton by reason of a supposed local meaning attaching to the mark "Gold Medal" and thereby give the plaintiffs a monopoly in that place.

The slender evidence to support this fabric is exposed by what is said by Lord Davey in a case already quoted from. For instance, a dealer in Hamilton says that before the defendants began to sell "Gold Medal," if he had been asked for that brand he would have sold the plaintiffs' flour. Naturally so, for the obvious reason that the plaintiffs' "Gold Medal" was then the only flour under that name sold in Hamilton. Of such kind of evidence Lord Davey said: "Unless the gentleman who gave evidence of that kind know that there are other manufacturers making similar classes of goods, there is no subject of comparison:" [1899] A. C. p. 346.

As to the right to use "Gold Medal" by the plaintiffs, it is matter for serious consideration. If these words con-

note the same idea as "Prize Medal" and if there is no foundation in fact for their use, the cases of *Batty v. Hill* (1863), 1 H. & M. 264, 270, and *Tallerman v. Dowsing Radiant Heat Co.*, [1900] 1 Ch. 1, 9, go far to shew that the plaintiffs would be outlawed for misrepresentation, but the matter may be left undisposed of on the present record. I have assumed everything in favour of the plaintiffs' title going back to 1885.

The brief sum of the whole is that the plaintiffs have signally failed to prove that the defendants have sought to palm off their flour as the flour of the plaintiffs; and the result is that the judgment should be affirmed with costs.

After handing out this judgment, I have found the point decided as to "Gold Medal" in a New York case, which was left undecided by us: see *Taylor v. Gillies*, 59 N. Y. 331 (1874).

Annotation by Editor.

PRIVY COUNCIL, *held*, that distinctiveness is of the essentials of a trade mark, and the word "Standard" although registered, is not a valid trade mark, within the meaning of the Trade Mark and Design Act, R. S. C. (1906), c. 71: *Standard Ideal Co. v. Standard Sanitary Mfg. Co.*, C. R. [1911] A. C. 259.

HON. MR. JUSTICE MIDDLETON.

FEBRUARY 19TH, 1912.

REX v. J. P. MURRAY.

3 O. W. N. 734.

Criminal Law—Evidence—Foreign Commission—To Great Britain.

MIDDLETON, J., granted a commission under Code sec. 716 to examine witnesses in Great Britain, without terms, as the witnesses were proper witnesses for the Crown to examine, they being able to give material evidence, and a case having been disclosed under Code sec. 997.

Application by the Crown for the issue of a commission to take evidence in Great Britain under sec. 716 of the Criminal Code.

W. G. Thurston, K.C., for the Crown.

J. Grayson Smith, for the accused.

HON. MR. JUSTICE MIDDLETON.—The accused is charged with an offence which is triable under Part XV. of the Criminal Code, relating to summary convictions. The issue of the commission is resisted upon the ground that upon the material the evidence to be given by the proposed witnesses is not sufficiently disclosed nor is it made to appear that the evidence is sufficiently material to warrant the granting of the commission. The case of *Regina v. Verrall*, 16 P. R. 444, is relied upon in support of this objection.

The application, in that case, was under sec. 683 of the Code of 1892, corresponding with sec. 997 of the present Code. That section relates to the taking of evidence where the accused is charged with an indictable offence, and differs materially from the section under which the present application is made.

Under the section in question, a commission is to issue to take the evidence of any person who is "stated to be able to give material information." Under the section considered by Mr. Justice MacMahon in the Verrall case, a commission is to issue "whenever it is made to appear . . . that any person who resides out of Canada is able to give material information."

I quite agree with Mr. Justice MacMahon that where the statute requires that "it shall be made to appear," the discretion of the Judge is to be exercised upon evidence making it to appear to him that the witness is able to prove some fact which is material; but I think the rule is quite different when all that the statute requires is that it shall be "stated" that the witness is able to give this material evidence.

Apart from this I am satisfied that the witnesses in question are witnesses who it is proper for the Crown to examine, and that from what is disclosed a case has been made out within sec. 997, had this application been made under this section. I therefore make the order sought. The statute does not warrant the imposition of any terms such as suggested by Mr. Smith.

HON. MR. JUSTICE BRITTON.

FEBRUARY 19TH, 1912.

RE HAY.

3 O. W. N. 735.

Will—Construction—Motion for under Con. Rule 938—Postponement of Time for Payment of Legacy—Death of Legatee before Payment—Vested Legacy—Residuary Clause.

BRITTON, J., *held*, that a legacy of \$35,000, upon the death of George Hay the elder, became the property of the late George Hay the younger in his lifetime, and did not lapse and did not pass under the residuary clause of the will, nor become part of his residuary estate.

An application by the Toronto General Trust Company for an order under Con. Rule 938, construing the will of the late George Hay, the elder.

W. Greene, for the Toronto General Trusts Corporation, executors of the will of the late George Hay, the elder.

G. McLaurin, for the executors of the will of George Hay, the younger.

J. F. Orde, K.C., for the children of the late George Hay, the younger.

O. Ritchie, for the Official Guardian.

HON. MR. JUSTICE BRITTON.—George Hay, the elder, made his will on the seventh day of July, 1906. Several codicils were subsequently made, and he died on the 25th day of April, 1910.

By the will, the widow is provided for, and she is not interested in the parts of the will now under consideration.

These parts are as follows:—

“I direct my trustee to set apart the sum of thirty-five thousand dollars and the investments representing the same and pay and deliver the same, free from succession duty, to my son George Hay, whereof five thousand dollars part thereof, shall be paid to him within two years after my death and the residue thereof, amounting to thirty-thousand dollars, within four years after my death, and in the meantime the net rents, issues, revenues and profits on the unpaid portion thereof shall be paid to him quarterly.

“And I further direct and declare that my trustee shall stand possessed of and interested in the whole residue of my estate and property and as soon as conveniently may be, shall

divide the same equally between and pay the respective shares to my sons and daughters and thereafter upon the death of my wife shall in like manner, divide the fund hereinbefore directed to be invested for her equally between and pay the respective shares to my sons and daughters. And in the case of the death of any one or more of my sons or daughters leaving a child or children him or her surviving, then the child and if more than one, equally between them, shall take his or her respective parents' share whether original or accrued. But if any of my sons or daughters shall die without leaving any child or children him or her surviving, then such share shall be divided equally between his or her surviving brothers and sisters, in equal shares."

Codicil No. 3 executed on the 19th day of April, 1910, contains the following:—

"I give, devise and bequeath to my son George Hay, a further legacy or additional sum of six thousand dollars for the purpose of furnishing him with means to purchase or acquire a home."

George Hay, the younger, died on the 26th day of November, 1911, having made his will on the 11th February, 1910.

The executors of George Hay, the elder, now apply for the construction of his will so far as it relates to the legacy of \$35,000 to George Hay, the younger, and they submit the following questions:—

"1. Did the legacy or bequest of \$35,000 to the late George Hay, the younger, vest in him and become his property in his lifetime and upon the death of his father the late George Hay, the elder?"

"2. Did the said legacy of \$35,000 upon the death of the said George Hay, the younger, lapse, and pass under the last clause of the will of the late George Hay, the elder, disposing of the residue of his said estate as in his will set forth?"

Since this motion was launched, Julia Fletcher, one of the daughters of the late George Hay, the elder, died in the State of Washington, one of the United States of America. She died on 25th January last and left a will appointing her husband, John G. Fletcher and Paul W. Webster executors. It appears that these executors desire to have Mary Brouson, sister of Julia Fletcher, appointed to represent Julia Fletcher's estate, and Mr. J. F. Orde, who now represents Mary

Brouson, was present and willing to act for Julia Fletcher's estate.

The sisters being in the same interest I accordingly appointed Mary Brouson to represent the Julia Fletcher interest.

This case seems to come quite within the rule—in *Hanson v. Graham*, 6 Vesey 239. That case “decided that the word ‘when’ in a will, alone and unqualified is conditional, but it may be controlled by expressions and circumstances so as to postpone payment or possession only and not the vesting; as where the interest on the legacy was directed to be laid out at the discretion of the executors for the benefit of the legatees, it vested immediately.”

In the present case the word “when” is not used, but the words, after directing the trustees to set apart the sum of \$35,000 and the investments representing the same, are that the trustees shall “pay and deliver the same,” \$5,000, “part thereof,” within two years after death of testator, and the residue thereof, amounting to \$30,000, within four years after testator's death, and in the meantime the net rents, issues, revenues and profits on the unpaid portion thereof shall be paid to him quarterly.

Re Gosling, Gosling v. Elcock, [1903] 1 Ch. D. 448, was cited. That followed what was called a well-settled rule of construction “that where there is a gift by will of a share of residue to be paid or transferred to the legatee on his attaining a particular age, with a direction that in the meantime the income of the share shall be applied for maintenance, the share is vested and not contingent.”

The present is a stronger case. It is a specific sum over and above residue, and the payment is not restricted to the two, and four years respectively, but payment might be made within the time mentioned.

In *Re Jowlby*, [1904] 2 Ch. 685, there was provision in the will that the legacy of the daughter—legatee—should not vest, but should be retained by trustees upon special trusts.

Re Couturier, Couturier v. Couturier, [1907] 1 Ch. D. 470, is expressly in point. The testatrix directed to set apart for her grandson, J. W. L. S. the sum of £200 . . . to be paid as to £50 part on his attaining the age of 21 years, £50 on his attaining the age of 25 years, and the balance of £100, on his attaining the age of 30 years. There was no

provision as to income and no gift over of principal. The grandson, J. W. L. S., survived the testatrix and having attained the age of 21 was paid £50 part of the £200, but he died before attaining the age of 25. It was held that the bequest was equivalent to the gift of a legacy, and that his legal personal representatives were entitled to the balance unpaid of both principal and income.

It was suggested that these cases were questioned by *Re Eve, Belton v. Thompson* (1905), 93 L. T. R. 235, and that the present case should be governed by the case last cited. In *Re Eve*, there was the declaration that the trustee should stand seized and possessed of his residuary personalty and realty, to retain certain legacies to themselves, and to pay the following legacies; to the brother of testator, the annual sum of £50 for the term of 5 years from his death, and the sum of £1,000 in six years after his death. The brother died before the expiration of 6 years from death of testator. It was held that there being no gift—except in this direction to pay—everything depended upon the expiration of 6 years, and the brother not having survived that period after the testator's death, his estate did not take the £1,000.

That case turned upon the construction put by the learned Judge (Kekewick) that there was no gift—only a direction to pay. There was no interest to pay, nothing to denote a gift beyond the direction to pay a certain sum in case the brother should survive the testator by six years. The learned Judge in referring to the cases cited—which included those now cited—stated that these cases did not assist much in the construction of this particular will.

I agree in that.

This is not a mere direction to pay; but it is a gift accompanied by a direction, and the payment of the money is not dependent upon the expiration of four years after the death of George Hay, the elder, and before the death of George Hay, the younger.

This conclusion must be reached whether the particular clauses in the will are alone considered, or whether the will, taken as a whole, is considered. The testator George Hay, the elder, intended to dispose of his whole estate.

I find no difficulty in the clause as to residue. The residue is divided into two parts: 1st, residue before death of wife; 2nd, residue consisting of that the use of which his widow had during her widowhood.

The words "original or accrued" are not inconsistent with the interpretation that what went to the children could not in any case be part of the residue. The will is one carefully drawn, and the testator adopting the words of the draughtsman, which he fully understood, left no room for doubt as to his intention to make a gift to each of his children.

The words set apart "pay over" in the paragraph where and as used are equivalent to words creating a gift.

1. The separation of the amount for the legatee, George Hay, the younger.

2. The payment of interest for the time the principal remained unpaid.

3. The way the testator dealt with residue.

4. The additional or further gift of \$6,000 to George Hay, the younger, by codicil 3, dated 19th April, 1910, are all in favour of vesting, and I have no doubt in deciding that the said legacy of \$35,000, upon the death of the late George Hay, the elder, became the property of the late George Hay, the younger, in his lifetime.

The said legacy did not lapse, and so did not pass under the residuary clause of the will of the late George Hay, the elder, or become part of his residuary estate.

Costs of all parties out of the estate, and of the executors as between solicitor and client.

HON. MR. JUSTICE TEETZEL.

FEBRUARY 21ST 1912,

GALLAGHER v. ONTARIO SEWER PIPE CO.

3 O. W. N. 742.

*Action—Dismissal—Action brought before Termination of Agreement
—To Take Sewer Pipe Clay from Land—Right of Action had not
Accrued.*

An action claiming an injunction restraining defendants from removing any more top soil from plaintiff's land, or any clay other than that referred to in the agreement, for a mandatory order requiring defendants to restore top soil for damages, reformation of the deed and agreement in question.

TEETZEL, J., dismissed the action without costs and without prejudice to any action which plaintiff might bring after 1st April, 1913, in respect of any claim for breach of agreement respecting top soil, at which time defendants' right under the agreement would expire.

Tried without a jury at the Hamilton Winter Assizes.

C. W. Bell, for the plaintiff.

J. A. MacIntosh, for the defendants.

HON. MR. JUSTICE TEETZEL:—By deed dated 16th July, 1906, the plaintiff in consideration of \$2,277 granted to the defendants “all the sewer pipe clay” on the portion of his farm therein particularly described, containing 7.59 acres, the defendant agreeing to remove “all the said clay to which they are entitled under these presents on or before the 1st day of April, 1913,” and also “that they will leave the top soil on the said lands and as nearly level as practicable.”

At the trial I allowed the plaintiff to amend by setting up an alleged agreement between the parties prior to the execution of the deed to the effect that the defendants were only to remove the clay to an average depth of not more than three feet, and obtaining a reformation of the deed to comply with such agreement, and damages for having in violation thereof removed a greater quantity of clay and other material.

I find upon the evidence that upon the negotiations for the clay it was contemplated by both the plaintiff and the representative of the defendant that as the result of test pits dug upon the property and from the depth to which sewer pipe clay had been removed from adjacent properties, the quantity of sewer pipe clay upon the plaintiff's property was much less in depth than the defendants have actually removed from plaintiff's land. I also find that the material which the defendants have removed at a greater depth than was originally contemplated is in fact sewer pipe clay, although until 1910 the defendants had not been using that quality of material at their works, because it contained a small proportion of gravel, and up to that date their machinery was not adopted for using clay with an admixture of gravel, but having during that year installed machinery by which gravel could be ground, they proceeded to remove from plaintiff's land to a depth considerably greater than it was contemplated they would do when the bargain was made with plaintiff, and which, notwithstanding the gravel, was profitably used as sewer pipe clay.

Beyond finding what both parties contemplated as above, I am unable to find that there was in fact any agreement arrived at whereby the defendants were to be limited in the depth they should excavate on plaintiff's land so long as

they removed sewer pipe clay only, so that the plaintiff entirely fails to establish the first requisite to support an application to rectify the deed. The mere circumstance that the plaintiff sold more than he thought he was selling, and the defendant got more than they expected, is not, in the absence of unfair dealing, sufficient to entitle plaintiff to have his deed rectified. See *Kerr on Fraud and Mistake* (4th ed.), 511-512; *Okill v. Whittaker* (1847), 1 De. G. & Sm. 83, and *Howkins v. Jackson* (1850), 2 MacN. & G. 372.

In this case fraud is not charged, nor can I find any satisfactory evidence of unfair dealing by the defendants.

Then again the consideration was paid and the deed executed, and the defendants placed in possession, so that the peculiar doctrines of equity applicable to actions for specific performance are entirely beside the question.

I think that while there is little doubt that had the plaintiff known that the material he was selling as sewer pipe clay extended in fact to a greater depth than the bottom of the test holes, or that the defendants would be entitled to remove a greater depth of material than had been taken from adjacent properties, he would have demanded and been paid a greater price; but I am unable, in face of the unrestricted terms of his deed, to give him any relief against the defendants' claim to excavate to a greater depth than either party originally contemplated would be done.

Plaintiff also alleges an agreement in May, 1909, whereby he claims that in exchange for an additional strip of clay 10 feet wide, the defendants agreed to surrender to plaintiff a certain portion of the land from which, under the deed, they were entitled to remove clay, and he claims that defendants have violated such agreement.

That there was a verbal agreement for exchange is admitted, but the quantity to be surrendered by the defendants is a matter of serious dispute, and the evidence as to it is most conflicting. I am not able to find that the portion claimed by the plaintiff was agreed to by the defendants, and while it may have been more than that conceded by the defendants, I cannot say that in fact it was more. The very indefinite character of defendants' letter of 17th May, 1909, purporting to evidence the agreement, instead of clarifying the intention of the parties, make it more difficult to accept in its entirety the oral evidence on either side as to what the true agreement was.

Plaintiff also charges that in violation of the agreement contained in the deed, the defendants have removed from the lands a large quantity of top soil. As to this part of the claim, while there was some evidence of improper dealing with top soil, the defendants may, before their rights under the deed expire (April 1st, 1913), restore and replace the top soil in compliance with the deed. So that while the action will be dismissed, the judgment will be without prejudice to any action the plaintiff may bring after April 1st, 1913, for any breach of the agreement respecting top soil.

Under all the circumstances, I do not think it is a case for awarding costs to the defendants.

HON. MR. JUSTICE SUTHERLAND.

APRIL 1ST, 1912.

O'HEARN v. RICHARDSON.

3 O. W. N.

*Vendor and Purchaser—Contract for Sale of Land—Time of Essence
—Note Given in Part Payment—Maker forgot Due Date—Bank
Failed to Notify Him — Refusal of Vendor to Accept Payment
after Due Date—Action for Specific Performance.*

SUTHERLAND, J., dismissed plaintiff's action with costs. No fraud shewn on part of vendor.—Plaintiff read over contract and understood it.—Mistake of due date not sufficient reason for relief.

An action arising out of an agreement for the sale of land, dated 7th December, 1910, and the purchaser, the plaintiff, seeking as against the vendor, the defendant, specific performance and in the alternative damages for breach thereof.

The price for the property was \$400 payable as follows: \$20 down and \$200 within five months, secured by a promissory note. The mineral rights were in the agreement reserved to one John F. Fitzmaurice, from whom the vendor had purchased the lot. He had bought it for \$100, and at the time of making the agreement still owed \$50 on account thereof. In the agreement he covenanted to "pay the balance of the purchase-price of the said lot to the said Fitzmaurice, as and when the same shall become due and to indemnify the purchaser in case of his default in so doing."

The deed of the vendor to the vendee, or the transfer of his certificate under the Land Titles Act, of the property in

question was deposited with the manager of a bank at Porcupine, in the district of Sudbury, in escrow, to be delivered to the purchaser on payment of a note for \$200 given for the balance of the purchase-money, and to be payable five months after the date of the agreement.

The solicitor who drew the agreement was known to the vendor, but unknown to the purchaser, and the latter was taken to him by the former. The agreement contained the following clause: "The party of the first (the vendor) covenants that he will execute the proper transfer of the said lot on completion of the payment of the full purchase-price herein by the party of the second part (the vendee). The party of the second part covenants that he will pay the instalments of purchase-price, as and when the same become due and payable. Time shall be of the essence of this agreement."

The plaintiff said that the solicitor inserted the provision about time being of the essence of the contract of his own motion; that there was no discussion about it, that he had no legal advice as to what was meant by it, and gave it no consideration, but had no idea that if he did not pay on the exact date the note became due, an end would be put to his rights. He, however, also said that he thoroughly understood the agreement when he signed it, that he read it over and it was clear. He further said that the vendor did not represent to him that he would have additional time to pay the balance of the purchase-money.

At the time the agreement was entered into the plaintiff procured a copy of it and made a memorandum in a little note-book of the date when his note became payable, viz., on 9th May, 1911. Some days before that, thinking the note would soon become due he endeavoured to find his memorandum but had mislaid it. Thereupon on 5th May, 1911, he wrote from Cobalt to the manager of the Traders Bank at Porcupine telling him that the note in question was payable at that bank, but as he had mislaid particulars he desired to know when it would be payable.

It was said that the mail service was not very good between these two places, and the letter was delayed in reaching the manager of the bank. At all events, he did not reply to the letter until the 12th May, when he wrote stating that the note was then several days past due, and had been protested for non-payment at maturity. It appeared that Richardson had discounted it. He also intimated in the letter that the

defendant had been in that morning and intimated his intention of taking action to break the agreement.

Before receiving this letter the plaintiff on the 14th May or shortly before had found his note-book and ascertained that the note was then over-due. Thereupon on that date he sent two telegrams from Cobalt to Porcupine, the one to said bank manager as follows:—

“Draw on me for protest fees and interest, \$200 wired by Bank of Commerce to-day. You did not notify me as to date note matured. Have you the transfer? Try and arrange matters with Richardson. Wire if necessary,” and the other to the defendant as follows:—

“Wired funds covering note to-day. Bank did not notify me when note matured. Draw on me for any extra expense. Wire if necessary.”

On 17th the bank manager wrote to plaintiff that as he had not met his obligations and “the papers in escrow were demanded by Mr. Richardson through his attorney,” the bank was obliged to surrender them. On same day plaintiff had written to defendant confirming the information already sent by telegram that he had arranged with the Bank of Commerce to have \$200 forwarded to cover the notes and was prepared to pay the protest fees and interest. In this letter he asked defendant to have the transfer of the property forwarded to him.

The defendant declined to do anything. Thereupon the plaintiff commenced this action. The defendant took his stand upon the contract and in his defence alleged that time was of the essence of the agreement; the plaintiff made default and thereby lost his right to call upon the defendant for a conveyance of the land in question. He brought into Court the \$200 paid by plaintiff to him and stated that he was ready and willing to return it to him with the promissory note which the plaintiff had given.

J. M. Ferguson, for the plaintiff.

J. Mitchell, for the defendant.

HON. MR. JUSTICE SUTHERLAND:—Defendant was not present at the trial. An application was made on his behalf to postpone it, but I was unable upon the facts as presented to me to accede thereto. It is said that the land considerably increased in value between the date of the agreement and the maturity of the note. I think it is clear that the

plaintiff had no intention to repudiate the agreement; that he intended to pay the note at its maturity and was able so to do, and that the reason he did not was owing to inadvertence as stated by him. The defendants rely upon *Labell v. O'Connor*, 15 O. L. R. 528, as being conclusive in their favour in this matter. I think it is. Reference to *Lovejoy v. Mercer*, 23 O. L. R. 29. No fraud, accident or mistake in the drawing up of the agreement in question was alleged or proved at the trial.

The plaintiff was not let into possession and had done nothing under the contract or in connection with the property in the meantime. The defendant in no way waived or condoned the default. See *Devlin v. Radkey*, 22 O. L. R. 399.

Under these circumstances and having regard to the fact that the document was read over to the plaintiff before he signed it and that he understood it, it would seem to me that one would have to read out of the document entirely the clause stating that time was of the essence of the contract before the plaintiff could succeed in this action. The action will, therefore, be dismissed with costs.

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HON. MR. JUSTICE MIDDLETON IN CHRS. APRIL 1ST, 1912.

APPLEYARD v. MULLIGAN.

3 O. W. N.

Process — Renewal of Writ — Abuse of Process of Court — Delay in Serving Writ to Extend Time Allowed by Statute of Limitation for Bringing Action.

MIDDLETON, J., *held*, that the limitation of 12 months allowed for service of a writ should not be idle, and before a writ can properly be renewed there must be some real excuse for the delay. Renewal is by no means a matter of course, and should only be granted under very exceptional circumstances.

Motion by the defendant to set aside ex parte order for the renewal of writ.

J. E. Jones, for the defendant George Mulligan.

J. H. Spence, for the plaintiff.

HON. MR. JUSTICE MIDDLETON:—The action was brought by writ issued on the 31st December, 1910, for damages for breach of contract and conversion of the plaintiff's goods. The writ was not served, and on the 30th December, 1911, an application was made before me for an order for renewal of the writ; the plaintiff's solicitors stating that the writ had not been served, owing to instructions received from that plaintiff, and an affidavit was filed by a student stating that the solicitors were informed that, owing to litigation in England, the plaintiff had been unable to give the necessary instructions.

This affidavit was entirely insufficient to justify the renewal of the writ; but as I was told that if the writ was not renewed the plaintiff would be without remedy, as her claim would be barred by the statute, I made an order providing

for the renewal of the writ and reserving to the defendants the right to move against the order if there were not in fact adequate grounds for the renewal, and directing that the writ should be served within six weeks, otherwise the renewal should be vacated.

The writ was served on one of the defendants within the time, but was not served upon the other. The defendant who was served moved to vacate upon a number of grounds.

It is quite clear that there was no difficulty whatever in effecting service upon this defendant at any time after the issue of the original writ. If there is any cause of action it arose in September, 1904. The matter has been already once litigated, and the action dismissed without prejudice to any other action the plaintiff might bring with reference to her alleged claims.

In making the order of the 30th December, I thought if the plaintiff had any bona fide excuse for not having served the writ within the twelve months, she would be in a position to shew the facts on the return of any motion to set aside the order; and upon this motion being made the matter has stood from time to time until to-day, and ample opportunity has been given to put forward any excuse there may be. Nothing has been suggested. The plaintiff's solicitor says that the only information he has is a cablegram protesting that the time limited for the service of the writ was unreasonable; and I am, therefore, obliged to give effect to this motion and to vacate my former order and to set aside all that was done under and in pursuance of it, with costs against the plaintiff.

The limitation of twelve months within which a writ may be served is not intended to be idle; and before a writ can properly be renewed there must be some real excuse for the delay. The renewal is by no means a matter of course, and is only to be granted under very exceptional circumstances. In my view the fact that the plaintiff, by holding a writ without service, and thereby seeking practically to extend the time allowed by the Statute of Limitation for the bringing of an action, indicates that her conduct amounts to an abuse of the processes of the Court and is entirely unjustifiable. Order and all done under it vacated with costs.

HON. SIR G. FALCONBRIDGE, C.J.K.B. MARCH 30TH, 1912.

BETHUNE v. REX.

3 O. W. N.

Revenue—Succession Duty—Action by Executors to Recover Payment to Provincial Treasurer—Mistake—Succession Duty Act, sec. 11.

Testator gave an annuity to Mrs. Anderson. The Succession Duty Act, s. 11 provides "that the duty payable upon any legacy given by way of annuity was to be paid in 4 equal consecutive annual instalments, and that in the event of the annuitant dying before the expiration of the first 4 years, payment only of the instalments which fell due before the death of the annuitant should be required." The executors paid the whole of the succession duty at once and obtained a release thereof. Mrs. Anderson died before receiving 4 annual instalments, and the executors brought an action, by way of petition of right, against the Provincial Treasurer to recover the amount of succession duty paid in excess to what would have been required had they paid according to annual payments.

FALCONBRIDGE, C.J.K.B., *held*, that petitioners could not recover. That there was no payment under mistake of fact, the only mistake (if any) related to future events, the death of the annuitant.

Petition of right presented by the suppliants as executors and trustees of the will of John Sweetland.

F. H. Chrysler, K.C., for the suppliants.

C. H. Gamble, K.C., for the Crown.

HON. SIR GLENHOLME FALCONBRIDGE. C.J.K.B.:—The petition after setting out the will, and probate thereof, states that the solicitor to the treasury for Ontario furnished the suppliants a statement shewing that the total succession duty payable in respect of the legacies and bequests of the said will amounted to the sum of \$8,379.82. That of this amount the sum of \$2,139.80 was attributable to duty payable in respect of the annuity bequeathed by the will of Caroline Florence Anderson; that in and by sec. 11 of the Succession Duty Act then in force, the duty payable upon any legacy given by way of annuity was to be paid in four equal consecutive annual instalments, and that in the event of the annuitant dying before the expiration of the first four years, payment only of the instalments which fell due before the death of the annuitant should be required.

The suppliants, deeming it advisable to discharge the whole of the succession duty at once, and obtain a release

thereof, paid to the treasurer for Ontario a sum of money which included the duty, amounting in the aggregate to \$2,139.80, attributable to the annuity bequeathed to the said Caroline Florence Anderson.

The said Caroline Florence Anderson departed this life on or about the 9th day of November, 1908, and therefore the suppliants claim that at the time of her decease the only amount which they were legally liable for was the instalment of \$534.95, which became payable on the 5th day of May, 1908. And the suppliants claim that they paid to the said treasurer \$1,604.85 in excess of the legal and proper amount payable.

The Attorney-General for Ontario, on behalf of his Majesty, objecting that the petition of right discloses no facts giving any cause of action to the petitioners against the Crown, says that the legacy or bequest to the said Caroline Florence Anderson, was not an annuity within the meaning of the Succession Duty Act then in force, and, therefore, is not affected by that provision of sec. 11, sub-sec. 1 of said Act, which requires payment only of the instalments falling due before the death of the annuitant; and he further pleads that if the legacy in question does come within the provision of sec. 11, then the amount paid for succession duty was paid under a mutual mistake of law, and is not recoverable back.

He further pleads in the alternative that if the petitioners are entitled to the repayment of the said succession duty as claimed in the petition, then a further succession took place on the death of the said Caroline Florence Anderson as to that portion of the estate from which her claim was derived; and the succession duty thereon would be ascertained and paid.

Further in the alternative, he pleads that the commutation of the succession duty to be paid was compromised upon the consideration of the whole estate, and the different interests therein; and if the petitioners are entitled to repayment as asked, then the whole matter should be re-opened, and a new computation made.

The case rests entirely on the correspondence and on the uncontradicted evidence of Mr. Bethune.

The money was voluntarily paid in supposed pursuance of sections 11 (1) and 12 (5) of the Succession Duty Act then in force (7 Edw. VII., ch. 10). Section 11 (1) is as fol-

lows: (set out the later form of the sub-section beginning with the word "provided"). Section 12 (5) is as follows: (Set out).

Both the solicitor to the treasury and the suppliants seem to have assumed that the benefit conferred by the will upon Mrs. Anderson was a legacy given by way of annuity within the meaning of sec. 11 (1). The authorities are quite clear that it was not an annuity. They are set out in the extended notes of argument, and the effect both of English and American cases is that the income or interest of a certain fund is not an annuity, but simply a gift of interest or income. Among the numerous authorities cited, I refer particularly to *Foley v. Fletcher* (1858), 3 H. & N. 769; *Winter v. Mauseley* (1819), 2 B. & Ald. 802, at p. 806, where Best, J., says: "I have always understood the meaning of an annuity to be where the principal is gone forever, and it is supplied by periodical payments." See in the U. S., *Booth v. Ammerman* (1856), 4 Bradford (N. Y. Surr.), 129, at p. 133.

If the money, then, was paid under mistake of law, which Mr. Chrysler seems to disavow, it could not be recovered back. James, L.J., says, in *Rogers v. Ingham* (1876), 3 C. D., at p. 355: "I have no doubt that there are some cases which have been relied on, in which this Court has not adhered strictly to the rule that a mistake in law is not always incapable of being remedied in this Court; but relief has never been given in the case of a simple money demand by one person against another, there being between those two persons no fiduciary relation whatever, and no equity to supervene by reason of the conduct of either of the parties . . ." That is not this case, and it is the Crown by whom the money is sought to be repaid; and the position of the Crown is, as one might expect, certainly not inferior to that of a subject. This is very clearly laid down in *Whitely v. Rex* (1909), 101 L. T. R. 741.

Then it was certainly not paid under a mistake of fact. The only mistake (if any) was something which related to a future event, viz., the absolutely unforeseen occurrence of this lady departing this life when she did.

I do not see, therefore, how the suppliants can recover. It is not a case of hardship, the estate as a whole does not suffer. If the money had not been paid in this way there would have been some other succession, and some of the

reversionary legatees being strangers, it is probable that in the result a larger amount of duty would have to be paid.

In this view, and considering that it was done to facilitate a winding-up of the estate, I think that the payment by the executors was not improvident; and probably in the passing of their accounts this circumstance will be taken into consideration.

I am of the opinion, therefore, that no case has been proved, giving rise to any cause of action against the Crown; and that it should be dismissed.

It is not a case for costs as between the parties. If I have power so to order, I direct that the suppliants be paid their costs as between solicitor and client out of the estate.

HON. MR. JUSTICE MIDDLETON.

MARCH 30TH, 1912.

RE IRWIN.

3 O. W. N.

Will — Construction — Originating Notice — Motion for — Trusts — Agreement between Husband and Wife to Live Apart — Payments to be made by Husband to Wife — Debentures Assigned to Trustee for Securing Payments — Gift by Testator of Several Annuities — No Indication that Testator Intended the Corpus of the Estate to be Encroached upon — Annuities out of Income only — To be Paid in Priority — To be Dealt with Annually — No Annuitant who Failed to Receive Full Amount has Any Claim against the Income for any Succeeding Year — Surplus of Income for Any Year May be Used in Payment of Arrears During Lean Years.

Originating notice of motion for an order determining questions arising upon certain trusts of the will of the late James M. Irwin, who died on the 8th October, 1908.

A. G. F. Lawrence, for the executors.

T. P. Galt, K.C., for Annie Irwin.

E. D. Armour, K.C., for Mrs. Bird, Lillian Irwin and her committee and for Mossom Irwin.

H. T. Beck, for Sherife Irwin.

J. R. Meredith, for the infant children of deceased son and of Mrs. Bird.

HON. MR. JUSTICE MIDDLETON:—A separation agreement was come to on the 26th November, 1891, between the testator and his wife Annie Irwin, by which, among other

things, the husband agreed to make certain payments to his wife while she should live separate from him.

On the 29th February, 1896, the testator executed a deed poll, by which he assigned to the late A. H. Marsh, Q.C., certain debentures therein mentioned, amounting in all to approximately \$6,000, for the purpose of securing the payments due and to accrue due to his wife, and, subject to these payments, "for the benefit of and among my children and their issue or some one, two or more of them, in such shares and proportions as shall be appointed by my last will and testament, and in default of such appointment then to divide the said moneys between my three daughters, Caroline, Bessie, and Lillian, or the survivor or survivors of them."

A further agreement was made between Irwin and his wife, and Mr. Marsh as trustee, on the 5th July, 1898, reciting the separation agreement and a desire to modify it in some respects, and the intention of Irwin to sell certain property and a request by him to his wife to join in the conveyance for the purpose of barring her dower, and that it had been arranged among other things to supplement the trust fund already held by Mr. Marsh, by placing in his hands a further sum of \$4,500, to be held for the purpose of paying the separation allowance, and "subject to such appointment hereof by the said party of the first part (the husband) to or among such one or more persons who at the time of appointment shall be members of the family of the said party of the first part as he the party of the first part shall by deed or will appoint;" and in default of appointment to divide between the three daughters or their survivors.

On the 5th July, 1898, Mr. Marsh executed a document acknowledging receipt of this sum, to be held upon the trusts declared.

After the death of Irwin some question was raised as to whether the wife's right to receive the payments under the trust deed came to an end; and on the 22nd March, 1910, the Honourable the Chancellor declared that the trust created by the above mentioned instruments ceased and determined on the death of Irwin.

In the meantime Irwin had, in reliance upon a divorce the validity of which is not now in question, contracted marriage with Sherife MacDonald, and she was treated by him as his wife.

By his will the testator gave all his property, save his household effects, etc., to his executors, with power to convert into money at such times as they in their unlimited discretion should think fit, and to invest the proceeds, holding the fund upon the following trust:—

First, out of the income, “as a first charge” to pay to his present wife, Sherife Irwin, an annuity of \$800 per year, so long as she lives and remains unmarried; and, as a second charge in order of priority to pay out of the income an annuity of \$500 per annum in equal quarterly payments to his daughter Lillian for her maintenance, and if she should die leaving children before the time arrives for the final distribution of his estate this annuity is to be paid to her children.

Thirdly, to pay out of the income a sufficient sum which, together with the income arising from the property which may be transferred to a trustee for that purpose, would make up \$600 per annum, in quarterly instalments to his former wife Annie Irwin, so long as she shall remain unmarried, this to be taken in lieu of dower, and in satisfaction of all claims under the separation agreement, and to form “a third charge in order of priority upon my estate.”

Fourthly, to pay out of the income an annuity of \$500 per annum in quarterly instalments to his daughter Caroline Bird, and after her death to her sons or the survivor until the period of distribution.

Fifthly, to pay out of the income an annuity of \$500 in quarterly instalments to the children of his deceased son James, which “annuity shall form a fifth charge in order of priority upon my estate.”

Upon the annuity to the testator’s wife Sherife ceasing to be a charge, the trustees are to pay to his son Mossom \$5,000; and upon the annuity to Annie Irwin ceasing to be a charge they are to pay to Mossom a further principal sum of \$2,000.

The final period of distribution is to be when the youngest of the two sons of James or the youngest of the now living sons of Caroline shall have attained the age of 21 years, or when the provisions in favour of the first and second wives shall have ceased to be a charge upon his estate, whichever shall be latest. Then the remainder of his estate is to be divided into four equal shares, and the income from one of such shares is to be paid to Caroline during her lifetime, and after her death the corpus is to be paid to her two sons

now living, or the survivor; Caroline and her sons being called class 1.

Another of these four shares is to be paid to the two sons of James, or the survivor, they being called class 2.

The income derived from the third of the four shares is to be paid to Lillian during her lifetime, and upon her death the corpus to be paid to her children then living; if she has none, then to be divided as set forth in detail. This is called class 3.

From the remaining share is to be deducted three-fourths of the amount which Mossom is entitled to under the other provisions of the will, and the balance is to be paid to Mossom, who, with his children if he shall die before the date of distribution, leaving children, is to be regarded as class 4; and the said three-quarters so deducted is to be divided between the three other classes.

Upon these clauses of the will several questions arise. The income of the estate is not sufficient to meet the annuities. The two wives claim that the annuities are charged not only upon the income but upon the corpus of the estate, or, in the alternative, that they are a continuing charge upon the income after the period fixed for distribution, until any arrears are fully satisfied; this being equivalent to a charge upon the corpus.

The cases upon the subject are very numerous, and not at all easy to reconcile with any clearly defined principle. Where the gift is of an annuity, and the disposition of the estate is subject thereto, there is no doubt that the charge is upon the corpus. *Carmichael v. Gee*, L. R. 5 A. C. 588, is an illustration of cases of this type. On the other hand, if the gift is of an annuity payable out of income only, the corpus is not charged. *Baker v. Baker*, 6 H. L. C. 615, is a case of this type. Between these two extremes there are many intermediate cases.

Sir John Rolt, L.J., in *Birch v. Sherratt*, L. R. 2 Ch. 644, thus contrasts the two classes:—

“If an annuity is given out of rents and profits, or dividends and interest, and the capital or corpus is given intact from and after the annuitant's death, to another, the case is equivalent to the case of a life interest with remainder over. But if the capital is given over, not from and after the annuitant's death but from and after satisfaction of the annuity and subject to the annuity. then I think

the case is equivalent to the case of a legacy and a residuary bequest, especially if the gift of the annuity itself admits of a construction charging it upon the capital of the estate or of the trust fund."

Lord Cranworth, in *Baker v. Baker*, *supra*, says:—

"In all these cases arising upon a construction of will the real question is whether that which is given is given as an annuity or is given as the interest of a fund; and when that question is to be considered what you must look to is this: whether the language of the testator imports that a sum at all events is annually to be paid out of his general estate or only the interest or portion of the interest or capital sum which is to be set apart. Now, in deciding that question, it is obvious that all we have to look to is the language of the particular will, and to ascertain what is the true interpretation of the language there employed."

In the same case, Lord Chancellor Chelmsford, after pointing out that the testator did not contemplate a deficiency, states that under these circumstances, not present to the testator's mind, the Court has "to impose as it were a new intention upon the testator, because, as he clearly contemplated that there would be a sufficient fund to pay this annual sum out of the interest and dividends and that the corpus of the fund was not to be touched for the purpose of assisting in its payment, you are now called upon to suppose that he had the intention of appropriating a portion of the corpus of the fund in case the dividends and interest out of which he declared the annual sum should be payable are proving to be deficient."

Lord Chelmsford then points out, as being a very strong controlling consideration, the impossibility of supposing that the testator might have contemplated that by "appropriating annually a portion of the corpus of the property it would be utterly annihilated and the beneficiaries would be left without any provision at all"—an intention which could not have existed in the mind of the testator.

In many of the cases the Court has found, in the expression used in connection with the devise of the property upon which the annuity is charged, an intention sufficiently expressed to charge not merely the income but also the corpus.

The cases cited for the "widows" fall under this head. In *Re Howarth*, [1909] 2 Ch. 19, the gift of the annuity was out of the income; but when the testator came to deal

with the corpus the gift was "subject to the aforesaid annuities"; which, as stated by Buckley, L.J., means "not subject to the payment of the annuities out of income as aforesaid, but subject to the payment and satisfaction of certain annual sums."

To the same effect is *Re Watkins*, [1911] 1 Ch. 1, where the corpus was given after the direction to pay an annuity out of the income to the widow "subject thereto" as a matter of interpretation the Court held that this meant not subject to payment out of the income but subject to the payment of the whole annuity; the effect of the terms by which the corpus was dealt with being regarded in each case as sufficient to charge it with the payment of the annuity; but there is nothing in the cases at all in conflict with what is said by Fletcher Moulton, L.J., in *Re Boden*, [1907] 1 Ch. 132, at p. 153, "that when the testator has directed that the payment should be out of income he did not intend the capital of his residuary trust fund to be disturbed in order to make the annual payments."

Turning then to the will, I think I find conclusive indications that the testator did not intend the corpus of the estate to be encroached upon. The provisions for the different annuities are not identical. In each case the gift of the annuity is out of income arising from the investments made by the executors; and in the case of Sherife there is an express direction that the principal money from which the annuity is derived shall upon her death or marriage fall into his estate and become subject to the provisions of the will. This provision is not repeated in the case of the other annuities, but the intention is plain. What the executors are to hold and invest is "all the rest, residue and remainder of my real and personal property of every nature and kind"; and upon the arrival of the period of distribution, the testator's desire is "that then all the rest, residue and remainder of my estate of every nature and kind shall be divided."

This, I think, indicates clearly that the same fund which the executors received is to be held until the arrival of the period of distribution and to be then distributed. There is nothing in the gift-over indicating any enlargement of the gift to the annuitants; and the gift to the annuitants is in each case a gift out of income, and income alone. The same reasoning shews that the annuities are charged upon the

income prior to the period of distribution and that there is no intention to create a continuing charge.

The only foundation for an argument to the contrary arises in the clauses dealing with the priority of the annuities. The expressions are loose, and vary in the different clauses. The annuities are declared to be "a first charge," "a second charge upon the investments," "a third charge upon my estate," etc. I do not think that these expressions can be taken to enlarge the gift. The sentences from which they are taken deal with the priorities only, and were not intended to enlarge the words of gift.

Then the question was raised as to whether these annuities should abate rateably or whether priority is given between the annuities. As I intimated upon the argument, I am unable to conceive any clearer expression of intention intimating that the annuities shall rank in priority than those used in this will. Sherife's annuity is made a first charge on the income from the investments; Lillian's is made a second charge in order or priority; Annie Irwin's a third charge in order of priority; Caroline's a fourth charge in order of priority; and that for the children of James a fifth charge in the order of priority.

The question was then raised as to how these annuities should be dealt with, having regard to the fact that the annual income will vary from time to time and will increase as unproductive property is realised. I think that the annuities are to be dealt with annually and that at the end of each year from the testator's death the executors should ascertain the amount of income available and should then determine the amount to which each annuitant is entitled—having regard to the priorities declared—and that no annuitant who fails to receive the full amount has any charge against the income for the next or any succeeding year in priority over the annuities payable in that year. Each year will thus be standing upon its own footing. If in any year before the final period of distribution the income derived from the estate is more than sufficient to pay all the instalments of annuity falling due in that year, such surplus will, I think, be available to meet any arrears that may be due to the annuitant in respect of instalments of annuity which fell due during lean years. This is, of course to be confined to the income prior to the date fixed for distribution. All the income prior to that date stands

charged with the annuity. If there is any surplus not required to meet the annuities and arrears of annuities, it will then fall into the residue to be distributed between the classes.

The next question presented was the right and duty of the trustees to apportion the proceeds of non-productive securities when realised. The governing principle is found in *Yates v. Yates*, 28 Beav. 639; where Sir John Romilly says:—

“Where a testator gives property to trustees with an absolute trust for conversion and with a discretion as to the time at which the conversion shall take place, if from any causes whatever arising from the exercise of the discretion and judgment of the trustees the conversion is delayed, then the tenant for life is not prejudiced by that delay, but is to have the same benefit as if the conversion had taken place within a reasonable time from the death of the testator; which is usually fixed at twelve months from that period.”

This principle is applied in *Re Cameron*, 2 O. L. R. 756, where the mode of computation is pointed out.

The next difficulty arises in connection with the fund held under the two declarations of trust called by counsel the “Marsh settlements.” Under these settlements and the separation deed the widow’s right ceased upon the death of the testator, as already determined. Under the first of these settlements the principal is to go to the testator’s children and their issue as the testator may appoint by his will. Under the second it is to go to such one or more persons who at the time of appointment shall be members of the testator’s family as he shall by his will appoint. The testator by his will has referred to these two declarations, and directed that these trust funds shall form part of his estate dealt with by his will.

The word “family” used in the second settlement *prima facie* means “children.” *Pigg v. Clarke*, 3 C. D. 672. The words, however, are elastic, and the context here would be sufficiently wide to cover the grandchildren—the children of the deceased son James—if at the time of the testator’s death these resided with and formed part of the recognized “family,” in a more colloquial sense, of the testator. The facts as to this are not sufficiently clear upon the material, but it may be supplemented before the order issues.

I do not think that either Sherife Irwin or Annie Irwin is entitled to share in the income derived from these securities; they do not fall within the scope of the power. The income from these securities will, therefore, be primarily answerable for the annuities payable to the children and possibly the grandchildren; but Annie Irwin will be entitled to have the securities marshalled and to compel Lillian to resort to the income of this trust in priority to the income from the general estate. This question has not been argued before me. If there is any question upon which counsel cannot agree, it may be mentioned later.

The next question is with respect to the insurance money. The testator was insured for a considerable sum, originally declared in favour of his wife and children. By his will he directed that the money should be applied and paid, \$500 to his son William, \$500 to his daughter Bessie, \$3,000 to his son Mossom, and the balance to be invested by his trustees; the income derived from one-fourth of such balance to be paid to Annie Irwin so long as she should be entitled to receive the annuity under his will, and the remaining three-fourths and the reversion of the said one-fourth "shall be divided into three equal parts, and one of the said parts shall be taken as supplementing the provision hereinbefore made for class 1, and one of the said parts shall be taken as supplementing the provision hereinbefore made for class 2, and one of the said parts shall be taken to supplement the provision hereinbefore made for class 3."

The only provision made for these classes by the earlier part of the will is a provision becoming operative at the period fixed for final distribution. Class 1, as already indicated, consists of the testator's daughter during her life, and after her death her surviving sons. I think this is a good declaration, under the Insurance Act, in favour of this class. Class 2 is the two sons of the deceased son James. I think this is a good declaration in favour of these two sons and that it constitutes a present gift to them. In the same way I think the provision for class 3 is a good declaration under the Insurance Act in favour of Lillian during her life and upon her death as provided by the will. Class 4 is, I think, a good present appointment in favour of Mossom, but it is subject to the deduction of \$7,000, which will far more than exceed Mossom's share. The amount of this share will

therefore fall to be distributed between the other three classes as indicated by the will.

The testator's daughter Bessie, to whom \$500 insurance money is given by this apportionment is said to be dead. The date of her death is not given. I assume that she predeceased the testator. If so, under the Insurance Act her share is distributed among the survivors of the preferred beneficiaries in equal shares. R. S. O. ch. 203, sec. 159, subsec. 8.

I think that covers all the questions submitted. If any point has been overlooked, or if this decision gives rise to any new difficulties, counsel are at liberty to speak to the matter before the order issues.

Costs of all parties may be paid out of the estate.

DIVISIONAL COURT.

MARCH 8TH, 1912.

RICE v. GALBRAITH.

3 O. W. N. 815; O. L. R.

Principal and Agent—Commission on Sale of Land—Parties Brought Together by Agent—Sale Effected by Principal without Agents' Knowledge—Right of Agent to Commission.

DIVISIONAL COURT, *held*, that if the relation of buyer and seller is really brought about by the act of the agent, he is entitled to a commission although the actual sale is not effected by him.

Burchell v. Gowrie, etc., C. R. [1910] A. C. 250.

Sager v. Sheffer, (1911) 18 O. W. R. 485.

Atkinson v. Alston, (1879) 48 L. J. Q. B. 733, and,

Stratton v. Vachon, 44 S. C. R. 395, followed.

Locators v. Clough, (1908) 17 Man. L. R. 659, not followed.

An appeal by the plaintiffs from a judgment of his HONOUR JUDGE DENTON, County Court Judge of York.

The appeal to Divisional Court was heard by HON. MR. JUSTICE CLUTE, HON. MR. JUSTICE LATCHFORD, and HON. MR. JUSTICE SUTHERLAND.

G. H. Kilmer, K.C., for the plaintiffs, appellants.

J. J. Maclellan, for the defendant, respondent.

HON. MR. JUSTICE CLUTE:—The action is for a commission on the sale of land. The defendant listed the property

with the plaintiffs, real estate brokers, in Toronto, for sale. It is clearly established that the plaintiffs brought the property to the notice of Mrs. Rough, who subsequently became the purchaser. The house was examined by her at the instance of the plaintiffs. Mrs. Rough is under the impression that her attention was first brought to the house at the instance of her brother-in-law, Mr. Blackie, and in this, I think, she is mistaken, and the Judge, while not deciding the point, seemed also inclined to that view.

Subsequently another brother-in-law of hers got in communication with one of the builders and so with the defendant Galbraith, and, acting for Mrs. Rough, finally agreed upon the purchase price, which was \$100 less than the defendant had instructed the plaintiffs to accept.

Upon the evidence, there can be no reasonable doubt that it was through the action of the plaintiffs that the defendant got in communication with the purchaser; and so I think it may be fairly found upon the evidence that the sale would not have been brought about but for the action of the plaintiffs. But it is said and the judgment below proceeds upon this sole ground, that the sale was in fact made by the defendant without knowing at the time that the attention of the purchaser had been brought to the premises by the plaintiffs. Upon this ground the trial Judge found for the defendant, following *Locators v. Clough*, 17 Man. L. R. 659. The judgment is by the Court of Appeal. Phippen, J. A., by whom the judgment of the Court was given, says: "I have no doubt that had the defendant sold with knowledge that the property had been introduced to Forrest by the plaintiffs, he would be liable for some commission. I cannot, however, hold that the mere introduction of the property to Forrest without endeavouring to negotiate or in fact negotiating a sale is itself an earning of the agreed commission, the owner effecting a sale on terms less favourable than those expressed in the commission contract, in ignorance of the plaintiffs' action, and under circumstances which did not place him upon inquiry."

I do not take this to be the law. A number of the cases bearing upon this point are referred to in *Sager v. Sheffer*, 18 O. W. R. 485. It has been held sufficient in most cases that the agent has been instrumental in bringing the purchaser and vendor together, although the negotiations are subsequently conducted exclusively by the parties. "If the

relation of buyer and seller is really brought about by the act of the agent, he is entitled to commission although the actual sale has not been effected by him:" *Green v. Bartlett*, 14 C. B. N. S. 681; *Street v. Smith*, 2 T. L. R. 131. "It is sufficient if the purchaser becomes such through the agent's intervention:" *Mansell v. Clement*, L. R. 9 C. P. 139. *Wilkinson v. Alston*, 48 L. J. Q. B. 736, is a very strong case in the plaintiffs' favour. This was not referred to in the Manitoba case.

The recent case of *Burchell v. Gowrie & Blockhouse Collieries Limited*, C. R. [1910] A. C. 250, was applied in *Stratton v. Vachon*, 44 S. C. R. 395. The last case proceeds upon the ground that the agent had brought the owner into relation with the person who finally became the purchaser and was, therefore, entitled to the customary commission.

The plaintiffs having brought the parties together and a sale having been effected by their intervention, it is not sufficient, in my opinion, to disentitle them to a commission to say that the vendor had proceeded with his negotiations with the purchaser without the knowledge that the agents had been instrumental in bringing the parties together.

I think this point was involved in the decision in the *Wilkinson* case. After various negotiations the sale was finally made by the agent writing a letter to a broker reminding him that the vessel was for sale. The broker took no notice of this letter and neither the plaintiff nor the defendant were aware that the letter was written, but subsequently the broker wrote to the defendant and afterwards disclosed the name of the principal for whom he was acting, and the sale was then effected. Bramwell, L.J., put the case very broadly: "The defendant practically said to the plaintiff: 'If you or White can find me a purchaser, and the purchase is completed, I will pay you a commission,' and the expression, 'if you can find me a purchaser,' may be explained as meaning, 'if you can introduce a purchaser to myself or can introduce a purchaser to the premises, or call the premises to the notice of a purchaser.'"

The decision of the Commission of Appeals, New York, is to the same effect, *Lloyd v. Matthews*, 51 N. Y. 125. There the objection was taken that the seller is entitled to know that the party with whom he is dealing is a customer of the broker, if such be the fact. In dealing with this ob-

jection, Lott, Ch. C., said: "The sixth proposition is not correct. It is to be understood in the connection in which it is presented, as declaring that, although a party is brought, through the agency and instrumentality of the broker, into a negotiation and dealing with the owner, which actually results in a sale, yet the broker is not entitled to compensation, unless it is made known to the owner that the purchaser is his customer. That is not true. It is sufficient that the purchaser is in fact such customer."

With respect, I think the judgment appealed from should be set aside and judgment entered for the plaintiffs for the amount of their commission, with costs here and below.

HON. MR. JUSTICE SUTHERLAND.—I agree.

HON. MR. JUSTICE LATCHFORD:—That the defendant employed the plaintiffs to sell the property is found as a fact by the learned trial Judge. The finding is amply supported by evidence, though denied upon oath by Mr. Galbraith. No limit as to time was imposed when authority to find a purchaser was given, nor was that authority ever revoked. It is satisfactorily established that the property was brought to the notice of the purchaser by the plaintiffs. They sent her a list of houses which included the defendant's, and took her to examine his house. The proceedings subsequent to the introduction of the property to the purchaser were conducted without further intervention by the plaintiffs, and the defendant when he closed the transaction was not aware that the purchaser had been introduced to the property by the only agents with whom he had placed it for sale.

The contract between the defendant and the plaintiffs was that he would pay a commission if they would find a purchaser. To apply the words of Mr. Justice Brett in *Atkinson v. Alston* (1879), 48 L. J. K. B. 733, they would in point of law fulfil the contract if they introduced the property to the notice of the purchaser and the latter purchased it in consequence of that introduction, though all proceedings subsequent to that introduction were carried on between the principals without any further intervention by the agents.

It would be impossible to find authority more directly in point. The case does not appear to have been cited in *Locators v. Clough* (1908), 17 Man. 659, nor to the trial Judge

in this case. It was referred to and followed in *Sager v. Sheffer* (1911), 18 O. W. R. 486, and is in principle and authority to be preferred to the decision of the Manitoba Court. See also *Stratton v. Vachon* (1911), 44 S. C. R. 395.

I think the appeal should be allowed with costs here and below.

HON. MR. JUSTICE KELLY.

MARCH 5TH, 1912.

MALOUF v. LABAD.

3 O. W. N. 796.

Company—Shares—Seized and Sold by Sheriff under Execution — Execution Act, 9 Edw. VII. ch. 47, secs. 10, 11 — No Proper Service of Notice—Place of Head Office of Company Changed.

KELLY, J., gave plaintiff judgment setting aside a sale made by a sheriff of 75,000 shares of a mining company and other interests in that company, owned by plaintiff, which were seized and sold by sheriff under an execution in an action by defendant against plaintiff.

An action to set aside a sale made by the sheriff of the district of Nipissing of 75,000 shares of the capital stock of the Gold Pyramid Mining Company of Larder Lake, Limited, and other interests in that company owned by the plaintiff Malouf, under an execution in an action of defendant Labad against him, and to cancel the entry of transfer thereof in the books of the company in favour of defendants Malouf Realty Company, and that plaintiff Malouf, of plaintiffs McCrae and Kouri, be entered as owners of these shares and interest.

G. A. McGaughey, for the plaintiffs.

A. G. Browning, K.C., for the defendant, Varin.

G. R. Brady, for the other defendants.

HON. MR. JUSTICE KELLY:—On the opening of the trial an application was made to have the name of Rouben McCrae struck out as a party plaintiff, on the ground that he had been joined as a plaintiff without his knowledge or consent. His name is therefore struck out without costs. I do not find that he was the owner of any of these shares.

On March 21st, 1911, the plaintiff Malouf was the holder of 75,000 shares of the capital stock of defendants, the Gold Pyramid Company, and under the terms of the agreement.

of 29th March, 1910, between him and that company, he was also entitled to 50 per cent. of the proceeds of the sale of 100,000 shares of a special issue of stock of that company, when placed on the market by the company for sale at 40 cents per share; these 75,000 shares and the right to the 50 per cent. of the proceeds of the sale, by plaintiff Malouf to the company, of his interest in certain mining claims.

Defendant Labad in December, 1910, obtained a judgment against plaintiff Malouf for \$475 debt and \$156.66 costs, Labad's solicitors in that action being Messrs. Hartman & Smiley, of New Liskeard.

On March 21st, 1911, plaintiff Labad assigned to Hartman & Smiley, as security for the payment of this judgment, all his right, title, interest, claim and demand in and to the agreement of March 29th, 1910; he also gave other securities for the judgment. There is no evidence that the Gold Pyramid received notice of this assignment. After this, but before July, 1911, Hartman & Smiley received from plaintiff Malouf, or on his account, \$150 on the judgment. In September, 1911, plaintiff Malouf sold to plaintiff Kouri 25,000 shares of his stock for \$2,000, and on September 19th received the consideration therefor, and certificate No. 632 for these 25,000 shares, on which was endorsed an assignment in blank by plaintiff Malouf, and dated September 25th, was delivered to the purchaser Kouri. Kouri then had the certificate and transfer submitted to Dr. A. K. Malouf, the secretary of the company at Montreal, for entry in the company's books. Kouri says this was done on or before September 27th, while the secretary says it was on September 30th. The secretary refused to have the transfer entered, alleging that he had doubts of the genuineness of plaintiff Malouf's signature to the transfer, which doubts he admits were not removed when there was produced to him on October 14th an affidavit of plaintiff Malouf verifying the signature. Entry of this transfer was never made in the company's books.

On September 30th, the Gold Pyramid Company received at its Montreal office, from defendant E. K. Malouf, who was then at Matheson, Ontario, the following telegram: "Don't transfer no N. N. stock. Wait my letter."

E. K. Malouf, who was at that time managing director of the Gold Pyramid Company, is the husband of defendant Nabiha Malouf, who was then the sole member of the defendant Malouf Realty Company.

On the night of October 1st, 1911, defendant Labad and E. K. Malouf arrived at North Bay and stopped at the same hotel, occupying the same room, their names being written in the hotel register by Malouf. They reached North Bay by the same train from New Liskeard; and, although they had known each other for a long time, each denied that he knew that the other was on the train until after their arrival at North Bay.

On the morning of October 2nd, they went to the office of J. M. MacNamara, a solicitor practising in North Bay, and gave instructions to issue a writ of execution on Labad's judgment against Malouf, with a view to the seizure of the 75,000 shares and the plaintiff Malouf's other interests in the Gold Pyramid Company. It was defendant E. K. Malouf who gave the instructions and particulars on which to act; and Mr. MacMamara's evidence is that E. K. Malouf was very anxious that the execution should be issued.

Hartman & Smiley had continued up to that time to be the solicitors on the record for the plaintiff in the action of *Labad v. Malouf*, although Labad says that about July, 1911, he transferred the solicitorship in that action to S. White, then of Cobalt.

Mr. MacNamara was the regular agent at North Bay for both Hartman & Smiley and S. White, and he issued the writ of execution endorsing it in the name of Hartman & Smiley, as solicitors for the plaintiff, the endorsement not taking any notice of the payment of the \$150 received by Hartman & Smiley prior to July, 1911.

Labad and E. K. Malouf accompanied Mr. MacNamara to the office where the writ of execution was issued, and to the sheriff's office with the writ; and the sheriff's fees were paid partly by Malouf and partly by Labad, who, however, says he repaid Malouf the amount so paid by the latter.

The sheriff on the same day proceeded to make seizure of the assets, which he purported to sell on the 14th October. On October 2nd, defendant E. K. Malouf sent from North Bay the following telegram to Dr. A. K. Malouf, of Montreal: "Execution seizure against N. N. stock and contract served on S. White. Copies sent to you. Stop every transfer. Answer Hotel Pacific, North Bay," and on the same date Dr. A. K. Malouf sent from Montreal to defendant E. K. Malouf, at North Bay, this telegram: "Your letters

received. No transfers. Letters mailed Matheson. Everything well."

The sheriff issued a notice, dated October 4th, directed to S. White, informing him of the seizure, and also on October 3rd wrote to Dr. A. K. Malouf, at Montreal, enclosing to him a copy of the notice issued to White, and a copy of the writ of execution. This letter reached Montreal on October 4th. The letter from the sheriff to White was taken from North Bay to Cobalt by the sheriff's bailiff, but White was absent from Cobalt through illness, and the keys of his office were in the possession of another solicitor, MacPhie, to whom the bailiff delivered the notice, E. K. Malouf having referred the sheriff to White for that purpose.

MacPhie had no authority to represent White in the matter, but forwarded the notice to him by post to Windsor, where he was supposed to be, but got no reply. There is nothing to shew that White ever received the notice.

On October 4th, Dr. A. K. Malouf telegraphed defendant E. K. Malouf, at Matheson, as follows: "Seizure copy received. No transfer. Everything well. Are preparing money."

There had been, and were then, pending other actions in which some of these same parties were concerned, and on the evening of October 13th, some telephone communications passed between Mr. Smiley, the solicitor at New Liskeard, and Mr. MacNamara, at North Bay, having in view the postponing of the sale by the sheriff.

Prior to the time of the sale to Kouri, Mr. Smiley and Mr. White reached an understanding that they would meet and endeavour to effect a settlement of the action of *Labad v. Malouf*, and of the other pending actions, but at Mr. White's request negotiations to that end were postponed until after September 21st. When that date arrived, Mr. White was absent from Cobalt, and did not return until October 29th. Mr. Smiley says that in view of this arrangement he endeavoured to have the sale postponed. Mr. MacNamara's evidence is that he instructed the sheriff to postpone, and requested him to telephone Mr. Smiley at New Liskeard about it. It is quite clear that there was to be telephone communications between Mr. Smiley and the sheriff, prior to the sale, and the sheriff admits that he received a message asking him to telephone to Mr. Smiley, and that he did, more than once, on the morning of the sale and

prior to the sale, endeavour to get telephone connection with him, but failed. He denies, however, that Mr. MacNamara instructed him to have the sale postponed.

At the sale by the sheriff at North Bay on October 14th, defendant E. K. Malouf, who had come from Matheson to attend it, became the purchaser, for defendant Malouf Realty Company, of the 75,000 shares and the other interest of plaintiff Malouf in the Gold Pyramid Company for the sum of \$300. On October 16th, the sheriff executed a transfer of what he purported to sell to the Malouf Realty Company, and on the 17th defendant E. K. Malouf deposited the transfer with the defendants, the Gold Pyramid Company at Montreal.

A meeting of the directors of the company was called for 5 p.m. on October 18th, and at that meeting it was directed that a certificate be issued for the 75,000 shares in favour of Malouf Realty Company, that the old certificate numbers 630, 631 and 632 for these shares be cancelled, and that effect be given to the sale by the sheriff of the interests of plaintiff Malouf in the company.

On the same evening Malouf Realty Company sold the 75,000 shares to one Cahill, a brother-in-law of E. K. Malouf, for \$550. On that day also an injunction order was issued restraining the defendants from selling, disposing of, transferring or dealing with the shares in question, and on November 15th this injunction was continued as against defendants Malfour Realty Company, restraining them from selling or delivering over or dealing with the shares and certificates, and as against defendants the Gold Pyramid Company restraining them from recording any transfer of these shares until the trial or other final disposition of the action.

In my view the most serious objections to the validity of the sale are found in what now follows.

It is declared by sec. 10 of the Execution Act, 9 Edw. VII. ch. 47, that "shares and dividends and any equitable or other right, property, interest or equity of redemption in or in respect of shares or dividends in an incorporated bank or an incorporated company having transferable shares shall be deemed to be personal property found in the place where notice of the seizure thereof is served, and may be seized under execution and may be sold thereunder in like manner as other personal property."

Sub-section 1 of sec. 11 provides that the sheriff . . . shall forthwith serve a copy of the execution on the bank or company with a notice that all the shares of the execution debtor are seized thereunder; and from the time of service the seizure shall be deemed to be made, and no transfer of shares by the execution debtor shall be valid unless and until the seizure has been discharged," etc.

Sub-section 2 of section 11 is that "such seizure may be made and notice given by the sheriff where the bank or company has within his bailiwick a place at which service of process may be made."

The Gold Pyramid Mining Company of Larder Lake, Limited, was incorporated by Letters Patent under the provisions of the Ontario Companies Act, 7 Edw. VII. ch. 34. Notwithstanding that the letters patent named Ottawa as the place of the company's head office, and that there is no evidence that authority was given as required by sec. 44 of the Act to hold meetings of directors or of shareholders outside the province of Ontario, all the meetings of both directors and shareholders, down to the time of the trial, were held in Montreal; moreover the books of the company were kept in Montreal, contrary to the requirements of sec. 114 of the Act.

The records of the company shew that on May 8th, 1911, the directors passed a resolution authorizing the transfer of the head office from Ottawa to Cobalt, and that in Cobalt Sol White, barrister, be appointed legal representative of the company to receive legal notice addressed to the company.

The words referring to the authority of Mr. White to receive legal notices were written in the margin of the company's minute book some time after the minutes were written. The secretary's explanation of this is that his clerk omitted these words when writing the minutes.

It is quite clear to me that what the directors had in mind was to formally make the change of head office to Cobalt, and, as meetings would continue to be held in Montreal, where the chief officers of the company were (and the occurrences subsequent to May 8th shew that this state of things continued), Mr. White, as the company's legal representative in Cobalt, would on the change of the head office being made, in some way be associated with it. The company failed, however, to carry this into effect.

The by-law required by sec. 86 of the Ontario Companies Act, in changing the place of the head office, was not passed, nor were the other requirements of that section complied with; nor can I find that under the circumstances the company had established, or, if so established, that there was existing at the time of the seizure, a place within the bailiwick of the sheriff of the district of Nipissing at which service of process could be made as required by sub-sec. 2 of sec. 11 of the Execution Act.

Assuming even that the resolution of May 8th were sufficient to constitute Mr. White a proper person on whom to make such service as it was necessary for the sheriff to make upon the company, I find that the service made by the sheriff on McPhie was not a compliance with the requirements of the Act. Mr. White was absent and at a distance of hundreds of miles not only from Cobalt, but from this sheriff's bailiwick, at the time of the alleged service, and for weeks both before and after it; his place of business was closed and locked, and the key thereof in the possession of another person on whom the alleged service was made, but who had no authority to accept service of process for or on behalf of Mr. White, and it is not shewn that the notice served on McPhie ever reached Mr. White.

/ The head office of the company not having been changed to Cobalt, and there being no place within the sheriff's bailiwick where process could then be served upon the company, how can it be said that the seizure was properly made or that the shares are properly found within that bailiwick?

For this reason I am of opinion that the attempted sale by the sheriff was and is void.

Plaintiff claims, too, that the sale is void by reason of the arrangement come to between Hartman & Smiley and White to leave the settlement in abeyance, that the sale should have been postponed under the instructions to that effect which Mr. MacNamara says he gave the sheriff, that the interest of plaintiff Malouf in the agreement of March 29th, 1910, was not saleable under execution; and that defendants other than the sheriff acted fraudulently and in collusion.

The sale of the 25,000 shares by plaintiff Malouf to plaintiff Kouri was a bona fide sale, without notice of the assignment to Hartman & Smiley; and, as between vendor and purchaser, Kouri, before the issue of the execution, be-

came the owner of these shares represented by certificate number 632. These shares were not saleable by the sheriff.

Defendants E. K. Malouf (who was also the agent of defendant Malouf Realty Company) and the Gold Pyramid Company were aware of this sale to Kouri, and with that knowledge E. K. Malouf took an active part in having the execution issued and in bringing about the sheriff's sale, and at the sale became the purchaser for Malouf Realty Company; he and the secretary of the Gold Pyramid Company were parties to the calling of the meeting of directors held on October 18th, and with all this knowledge the company sanctioned the transfer by the sheriff and ordered entry thereof to be recorded in the company's books, and plaintiff Malouf's certificates cancelled; and immediately Malouf Realty Company purported to sell the whole 75,000 shares to Cahill, the brother-in-law of E. K. Malouf. These facts, considered with the telegrams and other communications which passed between E. K. Malouf and the company, or its secretary, beginning on September 30th, the very day the secretary says Kouri had presented the stock transfer for entry, the meeting between defendants Labad and E. K. Malouf at North Bay (and which I find difficult in believing was accidental), and the close touch kept between E. K. Malouf and the company, or its secretary, during the proceedings leading up to and following the sale, convince me beyond doubt that the defendants, other than the sheriff, acted in such a manner and with such knowledge as to give good grounds for holding that there was collusion such as makes it impossible to uphold the validity of the sheriff's sale.

There will therefore be judgment setting aside the sale by the sheriff and cancelling the entry made in the books of defendants, The Gold Pyramid Mining Company of Larder Lake, Limited, of the transfer to defendant, Malouf Realty Company, of the 75,000 shares and other interests of the plaintiff Malouf, and directing that the certificate issued to Malouf Realty Company for such shares be delivered up to be cancelled; that plaintiff Kouri be entered in the books of the company as owner of the 25,000 shares represented by certificate number 632, and that a certificate for these shares be issued by the company and be delivered to him; that plaintiff Malouf be entered in the books of the company as owner of the remaining 50,000 shares, and that certificates

numbers 630 and 631 representing the 50,000 shares be delivered to plaintiff Malouf. Defendant Malouf Realty Company is restrained from delivering over, transferring, selling or otherwise dealing with the shares and interest purporting to have been sold to it by the sheriff.

As against defendants, other than defendants Varin, plaintiffs are entitled to their costs of action, including the costs of and incidental to the injunction. No costs against defendant Varin.

DIVISIONAL COURT.

MARCH 8TH, 1912.

DARKE v. CANADIAN GENERAL ELECTRIC CO.

3 O. W. N. 817.

Negligence—Master and Servant—Action by Widow to Recover for Death of Husband—Workmen's Compensation Act, secs. 2 (1), 3 (2)—Person Entrusted with Superintendence.

DIVISIONAL COURT, held, that a person in "superintendence" need not necessarily exercise superintendence directly over the workman injured, nor that the workman should be acting under the immediate order of such superintendent. It is enough if the superintendent and the workman are both employed in the furtherance of a common object to the employed, although each may be occupied in distinct departments of that common object.

Kearney v. Nichols, 76 L. T. 63, followed.

Judgment of MULLOCK, C.J. Ex.D., 20 O. W. R. 587; 3 O. W. N. 368, reversed.

An appeal by the plaintiff from a judgment of HON. SIR WM. MULLOCK, C.J. Ex.D., 20 O. W. R. 587, dismissing her action, brought to recover damages for the death of her husband.

The appeal to Divisional Court was heard by HON. MR. JUSTICE CLUTE, HON. MR. JUSTICE LATCHFORD and HON. MR. JUSTICE SUTHERLAND.

D. O'Connell, for the plaintiff, appellant.

G. H. Watson, K.C., and L. M. Hayes, K.C., for the defendants, respondents.

HON. MR. JUSTICE CLUTE:—The action was brought by the plaintiff, a widow and administratrix of Hugh Darke,

who was killed while in the employ of the defendants on the 15th June, 1911, owing, it is alleged, to the negligence of the defendants.

Darke was a workman in the defendants' employ under Jeffries, the foreman of the mechanical department. An electrical generator had been set up by Darke and his fellow workmen and fastened to the floor ready to be tested by Thompson, the electrical expert.

Thompson considered the machine insecurely attached to the floor and mentioned the matter to the foreman Jeffries who directed Cartner to remain with Darke while the machine was being tested by Thompson.

Anson was Jeffries' superior officer. One of the defences raised is that after the machine was set up it was examined by Jeffries and Anson who pronounced it complete and ready for inspection. Darke was ordered to some other work and had no right to further meddle with the machine without instructions from a competent authority which it is alleged was never given; that without authority he as a volunteer took it upon himself with Cartner to further secure the machine to the floor and in doing so placed himself upon the belt in order to reach the work he was engaged upon and while in that position Thompson having completed the connection and without the knowledge of Darke's position turned on the power, which caused the belt to move and drew him under the wheel, which caused his death.

The jury found in answer to questions: (1) that Anson and Jeffries inspected the machine on the afternoon of the 15th of June, and passed it as satisfactorily set up and ready for the electrical test; (2) Jeffries after such inspection informed Darke to the effect that the machine was satisfactorily set up and that the job of setting up was finished and put him on another job; (3) the machine was turned over by Jeffries to the electrical department as in condition to be tested between 5.30 and 6.00 o'clock p.m., on the 15th of June; (4) Darke was put on another job and left on such other job until shortly before the time for beginning the testing; (5) Jeffries took him off this job and instructed him to be present at and prior to the testing in question; (6) his duties on such occasion were to do all necessary mechanical work; (7) the defendants were guilty of negligence which caused the accident; (8) such negligence con-

sisted of (a) lack of proper code of signals; (b) lack of electrician's assistants so placed as to intelligently signal all clear before the application of the power; (9) the accident was caused by the negligence of a person in the service of the defendant who had superintendence intrusted to him whilst in the exercise of such superintendence; (10) such person was Thompson and his negligence was that he did not make a careful examination of machine and surroundings immediately prior to applying the power; (11) the jury acquitted the deceased of contributory negligence.

The jury also find that the accident was not caused by the negligence of any person in the service of the defendants, who had charge or control of any points, signals, locomotive, engine, machine or train upon a railway, tramway or street railway; (15) the jury find that the deceased while endeavouring to further secure the machine just prior to the accident was acting under Jeffries' general order to look after the machine; (16) that prior to turning on the power Thompson did not know that Darke was on the belt. The jury made no assessment at common law, but assessed \$1,800 under the statute.

Upon these answers judgment was reserved and subsequently given on the 9th of December, 1911, 20 O. W. R. 587.

The learned Chief Justice, after stating the nature of the case and the findings by the jury, proceeds as follows: "There is no evidence to support the jury's answer to question (9) that Thompson had intrusted to him any superintendence over Darke. Therefore, there is no liability under sec. 3, sub-sec. 2 of the Workmen's Compensation for Injuries Act, nor is there any evidence to support the jury's findings that Darke was acting under orders of his foreman, Jeffries, while endeavouring to further secure the machine so that there is no liability under sec. 3, sub-sec. 3.

"At common law the company would not be liable for the negligence of Thompson, who, as regards Darke, was a fellow workman. Thus, there is no common law liability. The evidence shews that Darke's duty was to do nothing until after the machine was set in motion, and though he knew Anson and Jeffries had carefully examined the condition of the machine and pronounced it satisfactory and that in consequence he was removed from the job, he by some mistake of judgment of his own motion, perhaps encouraged

by the opinion of Thompson who had no authority over him, to undertake to further secure the machine, and whilst so engaged met with the accident. Under the circumstances I fail to see where the defendant company is liable and think the action should be dismissed. This is not a case for giving costs."

The plaintiff contends that there was evidence to support the jury's finding; that in any event the system was faulty by reason of the lack of a proper code of signals and also by reason of the electrician's assistant not being placed so that he could intelligently signal all clear before the application of the power, and that the defendants are liable at common law as well as under the statute. They further claim that in any event there should be a new trial because of what took place in respect to the answer to question (13) as the view expressed by the Judge and urged by the defendants' counsel was that there was no evidence to support the charge that the death was caused by the negligence of some person in the service of the defendants who had charge or control of signals, engine, train, etc.

The principal question argued at bar was as to whether there was any evidence which ought properly to have been submitted to the jury in support of questions (9), (10) and (15). It was argued that Jeffries having inspected the job and passed it over to Thompson, Darke voluntarily and officiously interfered without authority and against his duty; that his duty did not begin until the test by Thompson commenced; that he was not subject to Thompson's orders, nor was Thompson a superintendent under sec. 3, sub-sec. 2 as defined by sec. 2, sub-sec. 1 of the Act.

If the facts are as suggested the judgment is, in my opinion, right; but it is, upon the other hand, strongly urged by plaintiff's counsel that the evidence shews what in effect the jury have found; that Darke was properly engaged in making the machine more secure at the moment when Thompson turned on the power which caused his death; that Thompson was a person having superintendence within the meaning of the Act, and that it was owing to his negligence in not taking reasonable care under the circumstances to ascertain that all was clear before he turned on the power that Darke came to his death.

The evidence upon this point depends upon a number of witnesses and the meaning to be ascribed to their evidence and the inference to be drawn from it.

It will be seen that on the findings of the jury to questions 1, 2, 3, 4, and 5, that Darke's work upon the machine to be tested was complete; that he was put upon another job; that he was afterwards taken off that job and sent back to be present at the testing, and that his duties on such occasion were "to do all necessary mechanical work." We thus have the position that Darke, having mechanical knowledge, was present at the machine with Thompson and his assistant to do any mechanical work necessary during the testing.

The case turns, I think, upon what took place after Thompson had arrived and while Darke was waiting to do such mechanical work as he might be called upon to do.

The learned Chief Justice in dealing with this part of the case says, "At about 9.40 p.m. Jeffries instructed Darke to be present at the testing along with one Cartner, and watch the bearings and bolts. Accordingly, Darke was in attendance and formed the opinion that the machine was not sufficiently secure and so expressed himself to Thompson, and said that he would add another bolt. Thompson seems also to have considered the machine insecure. Jeffries was not then present, though elsewhere in the shop. Darke went down the shop for a wrench, returned and proceeded to apply an additional clamp to the machine, Thompson standing at the switch at which point he could not see Darke, the machine being between them. A motion by Cartner was misunderstood by Thompson, as meaning that all was ready for the power to be turned on. This was done when the accident happened. Cartner was not Thompson's assistant proper; he was working with Darke and had been sent by Jeffries to assist, and at Thompson's request, because Thompson feared that the machine would move, that is it was not sufficiently fastened down. Jeffries was about leaving for home when Thompson saw him." Thompson had been working on another machine until half-past nine. He then went to superintend the starting of the machine, to see that the machine was operating properly, and to obtain certain electrical data which would prove whether the machine would come up to its guarantee, or not.

He says that Darke told him not to start for a moment that he wished to tighten a bolt. The witness says he has an indistinct recollection as to the time when he saw Darke (and this would appear so on reading his examination):

that Darke had been tightening up a bolt there and asked Thompson to go to the back of the machine, and he would point out where he had been tightening the machine; that Thompson went around and said, "Well, we will try it anyway at that." He says this was ten minutes or a quarter of an hour before he started the machine; that was before Cartner came; that Darke walked away and that he did not see him until after the accident; that before he started the machine he went around twice to see that all was clear; that Cartner gave, what he took to be a nod, that all was clear, and he turned on the power, when the accident occurred.

On cross-examination he says that when he looked around the machine he was under the impression that it might move, that it was not quite secure. He says that Darke came to him about half-past nine and told him that he would be alone after ten o'clock; that he said to Darke, "I think the thing will move, and to leave only one machine fitter on the job is not fair to us, because I do not want to be in all night, and if they only left one man it would mean a long job if it did move;" that after seeing Darke he saw Jeffries, the foreman; that it was after he told Darke he was afraid the machine would move that Darke said he would tighten the bolt at the back of the machine, and he went around there for that purpose; that at that time he did not know where Cartner was; that he did not see Cartner and Darke together at all; that he saw Darke tightening the bolt, and afterwards Darke came to him and he said, "I have tightened those bolts up now." That was previous to Cartner coming. When Cartner came he said "Wait a minute I want to tighten a bolt at the front," and Cartner then started to tighten a bolt in the front. This he says was no doubt ten minutes before the switch was turned on. He says, "I have only got a hazy opinion as to the periods of time."

"Q. So he told you not to turn the power on for a minute, he was going to tighten a bolt in the front? A. Yes.

Q. And saw him go there? A. Saw him go there.

Q. And afterwards saw him rise up? A. I saw him standing; I saw him rise up.

Q. What did you do? A. I signalled to him, a waive of the hand.

Q. And you got what you took to be a nod of the head? A. I got a nod, what I took to be a deliberate nod."

Upon being examined further about his conversation with Darke he says: That he did not make any round of inspection after Cartner told him he was going to tighten the bolt.

"His Lordship: Q. Did you see Mr. Jeffries that evening? A. Yes, my Lord.

Q. When? A. Possibly about twenty minutes previous to the accident.

Q. Where did you see him? A. Oh, probably 20 yards away from the outfit south of the outfit.

Q. Was this before you had gone on duty? A. This was after I had gone on duty.

Q. Was it before Cartner had told you that there was a bolt loose? A. Yes, before Cartner told me he was going to tighten up a bolt.

Q. Before he told you that, did you have any conversation with Mr. Jeffries in regard to tightening up this machine? A. Well, the conversation that I had with Mr. Jeffries was simply to the effect that I had heard Darke tell me there was only one man to be left after 10 o'clock, and that I thought that was not fair to us, and I asked him if he did not think it would be better to leave another man.

Q. To assist in the process of test? A. To assist in case anything moved.

Q. To assist in case anything went wrong after it began? A. Yes.

Q. That was the substance of your conversation with Jeffries? A. Yes, sir.

Q. That was all? A. That was all."

Cartner, a machinist, who was working with Darke at the time of the accident says that he was otherwise engaged in the shop until nearly 20 minutes to 10 o'clock; that Darke spoke to him about 9 o'clock and said that he did not like the look of the machine; that he did not think the machine was safe; that he thought it would shift, and that one man would be no good jacking it back again. He replied that it was for Jeffries to say whether he would stay or not, and Darke said he was going to see Jeffries, and he went with Darke; he did not hear all that Jeffries said, but Jeffries told him to stay with Darke until the load was on the machine, to see that everything was all right and if he wanted any assistance to give it to him. He did not hear Darke tell Jeffries that the machine might shift. After the

conversation with Jeffries Darke asked him to take a look at the clamp, which he had already spoken of. He did not think it safe. At this time Walker, another fellow-workman, was also there and the three of them talked it over and Cartner suggested putting in a jack, which was tried, but would not work. "We could not get a straight drawn on it." Darke then suggested putting in a clamp. This was got and they proceeded to put it in. They had some difficulty in doing so. They finally got the bolt through the slot and were wrenching down the nut, Darke kneeling on the belt which they thought was the quickest way in the interest of the firm to get the thing tightened down.

"Q. When you have to secure a machine who superintends the method to be adopted? A. The man in charge. We generally go to work to put up a machine, we pretty near know what was needed, and we go at it in that way, your Lordship."

Cartner stood up to rest himself from the bent position he had been in and Darke said if we could only get a little more squeeze on this we would be all right. Cartner got down again to assist, and the accident happened.

Jeffries was on the premises in the shop in the office. When asked by Mr. Watson whether Jeffries was informed of putting on this clamp he said he could not say; he thought the clamp was needed. He speaks of Darke being a pretty careful man, generally.

"Q. Then when you came to the machine about 20 minutes to 10—when did you see Thompson first? A. I went and told him we were going to put on this clamp.

His Lordship: Q. Who did? A. I did.

Mr. Watson: Q. You told Thompson you were going to put on the clamp? A. Yes.

Q. Why did you tell him that? A. Because he told me he was going to start up about 10 o'clock.

Q. That was the reason, and you told him that you and Darke were going to put on a clamp? A. That is one thing. I often wish I could remember. I do not remember the exact words, but I remember telling him we were going to fix that, because he said himself he did not think it was safe.

Q. You do not know about that? A. Only what he said.

Q. You did not hear him say that? A. No, he told Darke and Darke told me.

Q. Did the accident occur before or after 10 o'clock? A. It occurred before 10 minutes to 10, to the best of my knowledge.

Q. Did it? A. Yes, sir.

Q. And you say—who told you it was to be started at 10 o'clock? A. Mr. Thompson said he thought he would start about 10 o'clock.

Q. That is before you told him the new clamp was going to be put on? A. Yes, sir.

Q. And now you say it was started before 10? A. Started about 5 minutes to 10.

Q. Are you sure of that? A. To the best of my knowledge, because the whistle blew for 10 o'clock, just when we were getting him out of the belt.

Q. Then did you give him any signal to start? A. I did not, sir.

Q. If he says that in evidence that you got up and gave him a nod, which in the regular course would be a nod, a signal to proceed? A. I did not know a nod was a signal.

Q. Did you give any nod? A. No, sir, to the best of my knowledge anything I did when I rose up was done unconsciously, for I did not raise up with the intention of giving any signal."

He further says that Darke was in charge of this machine that night. He, Cartner, was not.

"Q. So that when Thompson started up according to your statement, he started up without any direct signal from you? A. Yes, sir.

Q. Too quickly? A. Too quickly, he thought when I got up, he made a mistake in starting up.

Q. But you were going on to say that doing this particular work it could be done more easily and conveniently on the belt? A. Yes, sir. We could not see any other way to get at it that night, and he got on, and thought he was working in the best position."

Being questioned again as to what Jeffries said, he says: "Mr. Jeffries told me to stay with Mr. Darke until the load was on the machine to see if everything was all right. If anything was not right I was to stay with him, but he said, 'Come in in the morning, I want you on the other machine in the morning.'

Q. If anything was wrong with the machine what were you to do? A. We would have to fix it to the best of our ability if anything went wrong in our scope, that we could fix.

His Lordship: Q. Did Mr. Jeffries tell you what the nature of the work was to be? A. Your Lordship, we pretty near understood it ourselves what had to be done. If anything went wrong, you see, there was no foreman there after 10 o'clock.

Q. If anything went wrong at what stage? A. When they start the machine up, the machine may shift, there is a chance of that, and we would have to go all over it again and fix it.

Q. Would you go and report that to Mr. Jeffries? A. After 10 o'clock there would be no one to report to.

Q. On whose judgment would you act? A. If we thought we should, we would do it.

Q. Has that been the course of action in that shop? A. Sometimes it was done.

Q. If the machine shifted? A. If they shifted, but I could not remember ever one shifting at night."

Then being asked as to the securing the machine, he says:—

"Q. When a machine is put in position on the ground and is handed over to the machine fitters? A. We have to secure it.

Q. Is there any one supervising your work? A. Personally, you mean?

Q. When you are doing it? A. We are there in our own discretion. He might be along, but when we are there we are actually doing the work ourselves. He might come along."

Then being asked as to the machine being sufficiently secured, he says:—

"A. I thought it had not enough hold.

Q. So that would be one of the things to which His Lordship referred, you would remedy if you saw fit, do so at your own discretion? A. Well, we might do it at our own discretion.

Q. Or substitute another clamp for it? A. If necessary."

Again being asked as to what he told Thompson, he says that he cannot remember the exact words:—

"I told him not to start up, we were going to fix this illow block.

Q. Did you proceed to do the work immediately afterwards? A. Yes, sir."

The witness Fielder, Thompson's assistant, saw Darke before the accident screwing some bolts at the back of the machine, but did not know where he was at the time of the accident.

The witnesses Bond and Kite prove that the machine was further secured after the accident by clamps, as was being done by Darke at the time of the accident.

Jeffries, the foreman over Darke, and in charge of him and the other men who set up the machine, swears that it was inspected by Anson, the general foreman over him and himself between 5 and 6 o'clock and the men put on another job, and that Darke had no instructions from him in the way of further securing the machine down to the floor; that his instructions were to watch the bearings and the belt at the start up and to see that the belt did not go off. He positively denies that he gave either Darke or Cartner instructions to put on a further clamp. On cross-examination he says that in doing work of this kind the men exercise their own discretion more or less. He admits that Darke had spoken to him and in consequence he had sent Cartner to remain with him and that Thompson had also spoken to him, but he does not remember clearly what Thompson said. He is asked:—

If Darke or Cartner saw a belt loose would it be their duty to fix it if you were not there? A. If there was no one else to; there would be no one else.

Q. If there was no one else, if there were a belt loose there would it be their duty to fix it?

Mr. Watson: Before or after?

Mr. O'Connell: While they were waiting for the test to be made? A. If they said it I suppose it would be made.

Q. It would be their duty? A. If it was—

Q. Never mind explaining the why. A. I do not just see—

Q. Do not try to define reasons. Tell me why, I ask you, why would they tighten the bolt? A. I suppose if it was necessary to tighten the bolt they would do so.

Q. Why, to make the machine more secure? A. May be that.

Q. Would that not be the only reason? A. Yes."

He denies that Thompson had any right of supervision or direction over Darke, but only over the men assisting him in the test.

A fair result of the evidence bearing upon the question of Darke being lawfully where he was and doing what he did at the time of the accident, may be shortly stated thus. he had been engaged under Jeffries during the day, setting up the machine. About half-past five it was inspected and pronounced complete and ready for the test by Jeffries and his superior officer, Anson. Darke was then put upon another job, but ordered to return to be present at the testing about half-past nine; that both Darke and Thompson thought the machine insecure and both Thompson and Darke communicated with Jeffries. Exactly what is disclosed does not clearly appear, but in consequence of these communications, Cartner was sent back with Darke to be present with Darke during the testing. Jeffries, while denying that he gave Darke no specific instruction to put on the clamp at which he was working at the time of the accident, yet admits that Darke had a certain discretion in work of this kind, and if it was discovered before the power was applied that a nut was insecure he might tighten it, and from his evidence I think it a fair inference upon which the jury might have acted that as Darke and Cartner were persons who understood and to whose charge had been committed the duty of setting up the machine and securing it ready for the test, they might reasonably and properly act upon their own discretion to further secure the machine, if they thought, and Thompson who had charge of the test thought, it was insecure. Thompson, being an electrical engineer, must have had better knowledge of the security required for the power to be applied than anyone else, and it appears to me that neither he nor Darke would have been reasonably discharging their obvious duty if, knowing the machine was insecure and that men were there competent to make it secure, the proper means had not been taken to further secure it.

I think, therefore, this was evidence which could not have been properly withheld from the jury, and that their finding to question 14 "By what authority or at whose instance was the deceased acting when endeavouring to further secure the machine just prior to the accident? A. Jeffries' general order to look after the machine." was well

warranted by the evidence; that he was not a volunteer in any sense but was at work in discharge of his duty at the time of the accident, and this I take to be the meaning of this finding.

Then was there evidence to support the answers to questions 9 and 10: Q. Was the accident caused by the negligence of any person in the service of the defendant who had any superintendence intrusted to him whilst in the exercise of such superintendence? A. Yes. Q. If so, who was such person and what was such negligence? A. Thompson, in that he did not make a careful examination of machine and surroundings immediately prior to applying the power."

The first question that arises is as to whether or not Thompson was a superintendent within sec. 3, sub-sec. 2, as explained by sec. 2, sub-sec. 1. It was strongly urged that under sec. 2, sub-sec. 1, superintendence must be a person under whose authority Darke was acting, that is having superintendence over him. I do not think this to be the meaning of the section. It should be remembered that under sec. 8 of the English Act. the expression, "person who has superintendence intrusted to him means a person whose sole or principal duty is that of superintendence and is not ordinarily engaged in manual labour."

The effect of sec. 2, sub sec. 1, is not to limit the word "superintendence" as found in the Imperial Act, but to extend it. In the Imperial Act, superintendence is limited to persons ordinarily engaged in manual labour. By sub-sec. 1, of sec. 2, the word "superintendence" is enlarged to mean any person who has general superintendence over workmen as is exercised by a foreman or person in a like position to a foreman, whether the person exercising superintendence is or is not ordinarily engaged in manual labour. It does not mean that the person having superintendence must have such superintendence over the person who is injured, but that wherever there is a general superintendence over workmen such as is exercised by a foreman or a person in a like position to a foreman there sec. 2, sub-sec. 1, applies, whether such person is or is not ordinarily engaged in manual labour. It in effect extends the application of the Act to cases not included, owing to the limitation in sec. 8, within the Imperial Act.

In *Kearney v. Nichols*, 76 L. T. 63, it was held by Denman, J., that it is not necessary that such superintendence

should be exercised directly over the workman injured or that the workman should be acting under the immediate orders of such superintendence. It is enough if the superintendent and the workmen are both employed in the furtherance of the common object of the employer although each may be occupied in distinct departments of that common object.

There the plaintiff's husband had been employed by the defendants as an under-looker in the mill in question, and on the day when he met his death, was engaged in cleaning and oiling some machinery. There were some structural alterations being made in the mill, including the removal of the engine house, and a man named Todd was appointed clerk of the works to superintend the structural alterations, being engaged by the architect but paid by the defendants. The jury found that Todd was guilty of negligence, that the death was caused by such negligence and that Todd was in the service of the defendants as clerk of the works intrusted with the superintendence of these structural alterations and was in the exercise of such superintendence when the negligence was committed.

The case was adjourned for argument. It was objected for the defence that the plaintiff was under no liability to take orders from Todd. If there was a superintendent it was not the clerk of the works, but one Hart, manager of the works, who had employed Kearney to oil the machinery and to whose orders he was bound to conform. Superintendence meant a superintendence over the man and over the work in which he was engaged, and that the words "service" and "superintendence" as used in sec. 1, subsecs. 5 and 8, shewed that the business of the superintendent and the workman must be the same, and as that was not so here, effect should not be given to the finding of the jury. In answer to this the plaintiff's counsel presented a very clear argument of the law as it existed prior to the Act and of the object of the Act, and that having regard to the true construction of the Act the master was liable for anything flowing from the superintendent's negligence while acting within the scope of his authority, whether the workman injured thereby was bound to obey him or not, provided he was employed in furthering the common end of the company or of him who was the common master of both. If sub-sec. 2 had been intended to have the limita-

tion put upon it which was contended for by defendants, it ought to have had added to it words similar to those of sub-sec. 3 stating that the workman was at the time of the injury bound to conform and did conform to the orders given.

Denman, J., intimated that although a strong case had been made out against the application of the Act, in his view the Act would apply to even a more extreme case than the one before him. He says, "suppose, for instance, there was a factory and that the person injured was one whose duty it was every day to go to the factory and put the bales of goods into carts: suppose, also that the stables of that factory were totally removed from the other departments, and that there was a foreman, or manager, of the stables, and that he negligently and improperly put a furious horse in a cart, causing injury to those in the cart; yet, looking at the words of the Act, and putting the construction on them, not, perhaps, that the Legislature might have intended, but the construction to be put on the words they had used, which was the true principle to be followed, he thought they would cover such a case as that just put, and that therefore they would cover the present case."

He then refers to the facts of the case as above stated, and proceeds: "Upon the whole it was a safe construction to put on the Act that it did cover the case where injury happens to anyone in the employment of the owner of the works through the negligence of a person intrusted with superintendence, though in another department of the works or business."

This case does not appear to have been questioned. It is referred to in Rugg's Employment Liability Act, 1880, p. 132, where he says: "The superintendence under sub-sec. 2 need not be exercised over the injured person. It is sufficient to render the employer liable that a servant who has superintendence, whilst exercising such superintendence, causes injury to a workman in the service of the same master."

I therefore think that Thompson was a person having superintendence within the meaning of sec. 3, sub-sec. 2, as explained by sec. 2, sub-sec. 1.

Then, was there any evidence that could properly be submitted to the jury of negligence on the part of Thompson? Thompson was an electrical engineer employed by

the defendants to whom was intrusted the duty of superintending the final testing of the generator, and having under him an assistant for that purpose. It is part of the defendant's case that Thompson was a man competent for his position. He knew what power was to be applied; what pull would be exerted on the machine when that power was applied, and he knew or ought to have known whether or not the machine was sufficiently secured to resist the power. In his opinion it was not sufficiently secured. This opinion was supported by Darke and Cartner. So fully did he realise this fact, that he communicated with Jeffries. He states in his evidence that he considered it his duty to examine the machine and to see that all was clear before he applied the power, and states that he went around the machine twice for that purpose. It was after he had made these examinations he says that he saw Jeffries and that Cartner came in answer to his request for another man and Cartner he knew was in the act of fixing the machine immediately before the power was turned on. He says that he did not know where Darke was, and the jury so find. He says that he understood that Cartner gave him a signal, a nod that all was clear. Cartner says he gave no such signal and that he knew of no signal of that kind to be given. Cartner says the power was to be turned on at 10 p.m., and notwithstanding Cartner told Thompson that we, meaning he and Darke, were going to fix the clamp and went immediately to do so, yet Thompson turned on the power before 10 o'clock, without ascertaining if all was clear. Was Thompson justified in a case of that kind in turning on the power without further examination or ascertaining for a certainty that everything was clear and ready for the power to be turned on? After going over the evidence with great care, I cannot say that there was not evidence that ought to have been submitted to the jury. I think there was evidence upon that question and that there was sufficient to support the jury's finding that Thompson was guilty of negligence. If Cartner's evidence is to be believed there was no code of signals and no signal was given. From the undisputed facts the jury might infer, if they believed Cartner, that Thompson carelessly took it for granted that all was clear when he saw Cartner standing there and negligently and carelessly turned on the power without satisfying himself where Darke was or whether all was clear.

With great respect, therefore, I am unable to agree with the finding of the Chief Justice that there was no evidence to support the answer to question 9.

With the view I take of the case, it is not necessary to consider whether there was evidence to support the answer to question 8 in regard to a code of signals or whether the jury received a wrong impression from the observations of the Judge and defendants' counsel as to whether the accident was caused by reason of the negligence of any person in the service of the defendants who had charge or control of any point, signal, locomotive, engine, machine or train.

The judgment below should be reversed and judgment entered for the plaintiff for \$1,800 with costs here and below.

HON. MR. JUSTICE SUTHERLAND:—I agree.

HON. MR. JUSTICE LATCHFORD:—I cannot add much that is useful to the judgment of my learned brother Clute.

It is manifest that the jury did not credit the superintendents who gave evidence that until the actual test began nothing remained to be done to the generator by the men connected—as Darke was—with the mechanical department. The machine was, as a matter of construction, completed. The test might, it is true, reveal latent defects, or shew that the capacity was not as great as was desired; but nothing that the highest technical knowledge could foresee had been left undone to make the generator structurally perfect.

The mechanical department had, after construction to secure the generator in a position for the test. Necessarily, the machine should be properly aligned, and so firmly attached to the metal floor that it would not be moved off its temporary bed when subjected to the enormous strain of the heavy belt. The slightest yielding to this strain would cause the belt to fly off, with obviously serious consequences.

Jeffries thought the generator was properly placed and sufficiently well secured. He swears that after he had passed it as secure, the only duty of Darke in relation to the generator was to look after the belts and bearings, and this only after the test began. Thompson, however, when about to make the test, considered that the machine might move, and so informed Darke and Jeffries; and asked

Jeffries for an additional man "to assist in case anything moved." Jeffries then undoubtedly changed his opinion that the clamping he had seen was sufficient, and he furnished Thompson with Cartner as assistant to Darke.

Jeffries and Anson both swear that Darke and Cartner would have no duty to discharge in connection with attaching the generator more securely to the floor until after the test actually began; but there are findings of the jury that Jeffries instructed Darke to be present prior to the test, and then, as well as after the test began, to do all necessary mechanical work. The jury manifestly discredited the testimony of Jeffries and other managers of departments, and properly drew an inference from the facts disclosed and the sequence in which those facts occurred.

After it was known to Jeffries, Thompson, Cartner and Darke that the generator might shift during the test, Cartner and Darke—in the presence of Thompson—proceeded to make the generator more secure. I think it absurd to say that they should have waited until the test began and the generator was pulled from its fastenings—temporary at best—and the belt flying from its pulley had wrecked everything within its destructive reach. It is, I think, also absurd to say that Darke, a mere machinist helper, in trying to make the machine more secure for the test was not acting under the superintendence of the engineer who was making that test for the defendants, and who conceived it imprudent or impossible properly to make such a test until the machine was secured as Darke was engaged in securing it when Thompson negligently caused his death. Thompson had, I think, superintendence entrusted to him within the meaning of sub-sec. 2 of sec. 3 of the Act. There is, in addition, evidence which fully warrants the finding of the jury that Darke was at the time of the accident acting under Jeffries' general order to look after the machine, that is, to do all things, both prior to the test and during the test, necessary to the proper application of the test.

I think the judgment appealed from should be reversed and judgment entered for the plaintiff for \$1,800, with costs of trial and appeal.

DIVISIONAL COURT.

MARCH 9TH, 1912.

WADSWORTH v. CANADIAN RAILWAY ACCIDENT
INSURANCE CO.

3 O. W. N. 828; O. L. R.

Insurance—Accident—Action by Beneficiary to Recover for Death of Insured—Death Caused by Fire—Fire Caused by Insured having A Fit—Question as to Quantum of Indemnity to be Paid—Construction of Policy.

The insured carried two accident policies with defendant company for \$5,000 and \$7,500 respectively. The policies contained a provision that in case the insured was injured "caused by the burning of a building in which the insured is therein (sic) at the commencement of the fire," the company should be liable to pay double insurance. The policies also contained another provision that in case the insured was injured, caused by "fits," the company should be liable only to pay 1-10 of the insurance. The insured had a fit, in which he either dropped or knocked over a lantern, which exploded causing a fire which injured the insured who died shortly after. The beneficiary claimed double insurance from the company while the company claimed that they were liable for only 1-10 of the policies.

DIVISIONAL COURT, held, that in construction of insurance policies, an ambiguous clause must be construed against rather than in favour of the company.

Re Etherington & Lancashire & Yorkshire Acc. Ins. Co., [1909] 1 K. B., at 596, followed.

That in this case it was the fit which caused the upsetting of the lantern and the subsequent fire, but the insured's injuries "happened," not from the fit but from the fire. Plaintiff given judgment for \$10,750 with interest and costs of trial. No costs of appeal success being divided.

LATCHFORD, J., *dissented*, agreeing with MIDDLETON, J., who tried the action, holding that the injuries were caused by the fit and the company only was liable for \$1,075.

An appeal by the plaintiff from a judgment of HON. MR. JUSTICE MIDDLETON, pronounced at the trial at Ottawa without a jury, in June, 1911.

The appeal to Divisional Court was heard by HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B., HON. MR. JUSTICE RIDDELL, and HON. MR. JUSTICE LATCHFORD.

H. Aylen, K.C., and R. V. Sinclair, K.C., for the plaintiff appellant.

I. F. Hellmuth, K.C., and J. G. Gibson, for the defendants, respondents.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—After long and careful consideration, in the course of which I have

many times perused the numerous authorities cited (citations from which appear in my brother Riddell's judgment), I have come to the conclusion (with great respect and after much hesitation), that I do not agree with the judgment appealed from, and think it ought to be reversed.

Part "G." of the policy which has to be construed is as follows: "In case of injuries happening from any of the following causes, viz., intentional injuries inflicted by the insured or any other person (other than burglars or robbers) fits . . . sleep-walking . . . causing death, loss of sight or limb . . . the company will pay 1/10th of the amount payable" . . . It is by no means easy to construe, and as my brother Middleton says, in none of the cases is there any attempt to construe such a clause.

I do not know whether there is any light shed on the subject by consulting the dictionaries as to the meaning of the verb "to happen" (same root as "capio"). The Imperial defines it "1. To come by chance; to come without one's previous expectation; to fall out." "2. To come; to befall." Murry (Oxford Dicty.) says: "To come to pass (originally by hap or chance); to take place; to occur, betide, befall. The most general verb to express the simple occurrence of an event, often with little or no implication of chance or absence of design."

While the clause does not aim to destroy absolutely the liability of the company, yet its language is intended to limit that liability to a fractional amount of the sum payable under other circumstances, and so it ought to be construed strongly against the company. The insurer accepts the policy with the view and for the purpose of covering all accidents which may "happen" to him. In *Re Etherington & Lancashire & Yorkshire Ins. Co.*, [1909] 1 K. B., Vaughan Williams, L.J., says, at p. 596, "I start with the consideration that it has been established by the authorities that in dealing with the construction of policies, whether they be life or accident or marine policies, an ambiguous clause must be construed against rather than in favour of the company." Farwell, L.J., at p. 600, expresses the same view.

The cases of *Winspear v. Accident Ins. Co.*, 6 Q. B. D. 42, and *Lawrence v. Accident Ins. Co.*, 7 Q. B. D. 216, followed in the United States in *Manufacturers Ins. Co. v. Dorgan*, 58 Fed. Rep. 945, would be absolutely in point if in the Lawrence case the fit had started the train which passed

over the deceased and in the Winspear case the fit had set loose the flow of water which drowned the insured. But, on a consideration of the numerous cases on the subject of proximate cause, and *causa sin qua non*, e.g., the illustration that the birth of the insured was a cause of the accident inasmuch if he had never been born the accident could not have happened; I have arrived at the conclusion that notwithstanding the finding of the trial Judge, which we are bound to accept, that it was the fit that caused the upsetting of the lantern and the subsequent fire, that the injuries "happened" not from the fit, but from the fire.

Therefore, I agree with my brother Riddell, in thinking that the appeal should be allowed in part and judgment entered for the plaintiff for \$10,750, and interest from the teste of the writ; plaintiff to have costs of the trial: no costs of appeal to either party.

HON. MR. JUSTICE RIDDELL:—John Allen James Wadsworth, a man of some means, living in Ottawa, procured from the defendants two policies of accident insurance of date 24th December, 1907, and 30th July, 1909, respectively in favour of his wife the plaintiff. The material part of the policies—they are in the same form—is here subjoined:—

"The Canadian Railway Accident Insurance Company, Ottawa, Can., in consideration of the statements, agreements . . . in the application and of the annual premium of—payable . . . does hereby insure John Allen James Wadsworth . . . Against bodily injuries caused solely by external, violent, and accidental means, as specified in the following schedule (subject, however, to the terms and conditions hereinafter contained), and against disability from sickness, as follows:—

This policy may be renewed from year to year upon payment of the annual premium payable as aforesaid in each year during the continuance in force thereof, and the payment of each consecutive full year's renewal premium of this policy, shall add 5 per cent. to the principal sum of the first year until such additions shall amount to 50 per cent., and thenceforth so long as this policy is maintained in force the insurance shall be for the original sum plus the accumulation of 50 per cent., as aforesaid.

The principal sum of this policy in the first year is \$5,000 with 5 per cent. increase annually for 10 years will amount to \$7,500.

SCHEDULE OF INDEMNITIES.

Part A.

If any of the following disabilities shall result from such injuries alone, within 90 days from the date of accident, the company will pay in lieu of any other indemnity:—

In one payment.

For loss of life	The Principal Sum
For the loss of both hands, by severance at or above the wrists	The Principal Sum
For loss of both feet, by severance at or above the ankle	The Principal Sum
For the loss of one hand, at or above the wrist, and one foot, at or above the ankle	The Principal Sum
For loss of entire sight of both eyes, if irrecoverably lost	The Principal Sum
For loss of either hand, by severance at or above the wristhalf of	The Principal Sum
For loss of either foot, by severance at or above the anklehalf of	The Principal Sum
For the loss of entire sight of one eye, if irrecoverably lost ...one-third	The Principal Sum

The payment of one Principal Sum in any case shall end this policy.

* * * * *

DOUBLE PAYMENTS.

Part C.

If such injuries are sustained while riding as a passenger in any passenger steamship or steamboat, or in any steam, cable, or electrical passenger railway conveyance, or in a passenger elevator, or are caused by the burning of a building in which the insured is therein at the commencement of the fire, the amount to be paid shall be double the sum specified in clause under which the claim arises.

* * * * *

Part G.

In case of injuries happening from any of the following causes, viz., intentional injuries inflicted by the insured or any other person (other than burglars or robbers), fits, vertigo, sleep-walking, duelling, war, or riot, exposure to un-

necessary danger, engaging in bicycle, automobile, or horse racing, or while under the influence of intoxicating liquor or narcotics, causing death, loss of sight or limb as stated in Part "A.," the company will pay one-tenth of the amount payable for bodily injuries as stated in Part "A.," under which claim arises; or if such injuries result in total or partial disability as provided in Part "B.," the company will pay one-tenth of the amount payable for weekly indemnity as stated in said Part "B.," under which claim arises.

Part H.

In case of the happening of injuries mentioned in special indemnity clauses D., E., F., and G., claims shall be made only under said clauses, and the amount to be paid under said clauses shall be the full limit of the company's liability, and such claim will not be entitled to double benefit as provided in Part "C."

Wadsworth paid all premiums due until his death, October 24th, 1910, under circumstances, which will be set out later in this judgment. The widow claimed that the case came within Part "C.," as being "caused by the burning of a building in which the insured is therein (sic) at the commencement of the fire," and claimed \$11,000 and \$10,500 under the policies respectively; the company tendered \$1,075 which was refused. The position taken by the company was that Parts G. and H. applied, and that the whole amount (if anything) to which the plaintiff was entitled was \$550 under the one policy and \$525 under the other.

In action brought the defendants pleaded that Wadsworth had in the application represented that he had never had and was not subject to fits, a disorder of the brain, or any bodily or mental infirmity which the company alleged was untrue, as he had had and was subject to fits or vertigo; and these mis-statements were material.

At the trial it was decided on satisfactory evidence that the only instance of illness of anything which could be considered as coming under the description did not take place till long after the issue of the policies; and there is nothing to indicate that there was any misrepresentation. The other defence the learned trial Judge gave effect to; and this forms the subject of the present appeal.

The facts surrounding the death of the insured are not complicated. In October, 1910, the insured went with other members of a hunting club to their club-house in the township of Hincks. On the 23rd October, some of the members of the club were out all day hunting, and when they came in comparatively late and after supper-time Wadsworth, who does not seem to have been out that day in the afternoon said he was not feeling well and did not feel like eating—he did not have any supper, and went and layed down upstairs. About 8.20 or 8.30 he came downstairs, declined an offer of something to eat, and asked the chore boy to open a bottle which he had. This the boy did; and the deceased dissolving a tablet in some fluid out of this bottle, drank the solution. He then left the room and went outside. A dog was heard barking shortly after and when the boy went out to investigate he noticed the water-closet on fire. The alarm was raised and a number of persons ran to the burning building with water; after the fire was extinguished, at least in part, the deceased was found sitting at one end of the building, and on the opening of the closet or perhaps the boards of the seat leaning back against the wall, his trousers not lowered. He was taken out moaning, apparently in pain, carried limp as he was to the club-house and put on a table. He was found to be rather badly burned about the feet, up the back of the buttocks and around the face and head, also a patch on the chest and on the shoulders.

He received treatment from a medical man who was one of his club-mates and was shortly thereafter removed to Ottawa and placed in the Carleton General Hospital where he died the next day of shock.

The closet was a small building $4\frac{1}{2}$ or 5 feet long and about as much in depth, with no front, but wooden sides and back and with two holes in the seat.

Next day the boy found in the bottom (i.e., we are informed the pit), the side of an ordinary stable lantern such as were in use at the club for going out with, and while Wadsworth had not taken a lantern out with him so far as the witness could say, there was one noticed missing next day. It seems fairly clear that Wadsworth took the lantern with him to light him to the closet, it being quite dark when he went out, and it being usual to take a lantern on such occasions.

The building was not burnt, not even badly scorched, and there was no smell of oil on the day after the accident when Labelle found the lantern; and no considerable part of the lantern seems to have been found but the "side," which was found in the pit—the globe was not found, but one witness saw the night of the casualty, broken glass the shape of a globe lying on the platform or floor of the closet opposite one of the seats. We are told that this was at the opposite end of the closet from where Wadsworth was found, but I do not find this made clear upon the evidence, and I cannot say it is material one way or the other.

In July of the same year Wadsworth at the same clubhouse after dinner "seemed to faint away;" it was very warm, but he did not seem to be suffering from the effects of the heat.

The medical man who attended him at the club gave a certificate, October 29th, saying amongst other things: "I can only account for his getting burned by believing that he must have taken a fit or fainted, and in so doing upset the lantern thus setting himself on fire. Everything in connection with the burning seems to indicate this."

From the evidence of this medical man and another called at the trial my brother Middleton came to the conclusion that the unfortunate man "took a fit when he was in the closet, and that while in that fit he either dropped or knocked over the lantern, the lantern exploded or was spilled or was broken by the fall, the result was that the oil escaped and there was almost immediately a very extensive flame which enveloped him and inflicted the very severe injuries from which he died." And the deceased was affected with a "malady" . . . known as minor epilepsy or petit mal."

I think my learned brother's conclusion amply sustained by the evidence, and I have arrived at the same conclusion from an independent consideration of the facts as proved.

It seems to me also clear that the injuries were not "caused by the burning of a building" at all.

What is said about the building is indeed that it was on fire (p. 5) not very badly scorched; (p. 11) the cook told others of the fire; (p. 14) that the closet was on fire; (p. 32) but as one of the witnesses threw a pail of water upon the roof, it may perhaps be inferred that the building did burn—that it was a "burning building" within the meaning of the policy—as in law *Regina v. Parker* (1839), 9 C. & P. 45,

per Parke, B., it being sufficient that it be scorched and charred in a trifling way.

But the condition of Part C., is not that the injuries be sustained while in a burning building the language is not the same. As in the former part of Part C. "sustained while riding . . . in any . . . steamboat or . . . railway conveyance . . . the words not "sustained while in a burning building," but "caused by the burning of a building." We are referred to *Houlihan v. Preferred Accident Insurance Co.* (1908), 145 N. Y. St. 1048, as deciding that the two expressions are synonymous. In that case the leading judgment by Clarke, J. (in which all but one of the other Judges concurred, and he agreed in the result), says p. 1050: "It must be that what was attempted to be guarded against was injury in the insured resulting from fire while in a building." In this conclusion I am unable to agree—the words "caused by the burning of a building" have a clear and unambiguous meaning and a meaning distinctly differing from that of the words employed by the learned New York Judge. Nor in my view does the case of *Northrop v. Rv. Passenger Assurance Co.*, 43 N. Y. 516, cited as supporting the conclusion assist, even if it be well decided—that being simply a decision that where a passenger has to walk from a railway station to a steamboat landing 70 rods distant, she did not cease to be "travelling by . . . public conveyance provided for the transportation of passengers."

But if we were to give full authoritative weight to the *Houlihan* case, I do not think that even then the plaintiff would have made out her case. There the bedclothes and mattress of the bed upon which the deceased slept were burned, her night clothes were burned from her and other circumstances shewed that it was the burning of permanent or quasi permanent furnishing and contents of the room which set fire to her—it was not as in this case the blazing up and burning of oil brought by the deceased into the room for a purely temporary purpose. Whatever may be the law in the case of the burning being caused by the ignition of permanent or quasi permanent contents of a room, I venture to think that no stretch of language can reasonably make injuries caused by burning oil which is brought into the room by the insured for a temporary personal purpose only come within the meaning of the words "caused by the burning of a building."

The claim of the plaintiff is in my view not well founded.

Then as to the application of Parts G. and H. The meaning of G., so far as affects the present case is: "In case of injuries which happen from fits or vertigo, and which injuries cause death, the company will pay one-tenth of the amount stated in Part A."—the participle "causing" in the third line being in the same grammatical relation as the participle "happening" in the first line. The clause does not mean "In case of injuries which happen from fits or vertigo, which fits or vertigo cause or causes death, etc., etc."

The only question then is whether the injuries happened from fits or vertigo, because they undoubtedly did cause death.

In considering this question we must look at the case from a common sense business point of view avoiding metaphysical subtlety; ever having in mind that such agreements being in the language selected by the company should where there is a real ambiguity, be construed strongly against the company, we are not by too refined or unnatural an interpretation of the language employed to conjure up an ambiguity where none really exists.

"It is only a fair rule . . . which Courts have adopted to resolve any doubt or ambiguity in favour of the insured and against the insurer: *Manufacturers Accident Ins. Co. v. Dorgan*, 58 Fed. Rep. 945, at p. 956, per Taft, J., (now President Taft); but it would not be a fair rule to invent or imagine doubt or ambiguity where none can be found.

In view of the law as laid down by the decisions I do not think, however, that there can be said to be any ambiguity or doubt.

The injuries which caused the death are the burns—did these happen from fits or vertigo?

I do not lay any stress whatever on the use of the plural "fits"—nor do I think that if the cause were an epileptic fit, the plaintiff could recover because the plural is used in the policy instead of the singular. "Fits" is colloquially the same as "fit." Cf. Murray New Eng. Dict. sub voc. "Fit," pp. 262 ad fin., 263 ad. init. c, d. Also in the English cases of epilepsy, which will be cited, the words "fits" is used in the policy, but the insured had only the one fit—indeed in case at least of death, it would scarcely appear that more than one fit was to be considered. The burns were caused primarily and immediately by the fire—the fire was the proximate cause. In philosophy it is said "*causa causæ causantis*,

causa causans ipza."—and if in law the cause or the proximate cause were itself an efficient cause, there would be no difficulty in the present case. No doubt the fire was caused by the fits and vertigo. Does that make these an efficient cause?

Two recent cases in England are strongly pressed upon us. In *Wenspear v. Accident Ins. Co.* (1880), 6 Q. B. D. 42, the policy did not extend to "any injury caused by or arising from natural disease or weakness or exhaustion consequent by disease." W., being the insured, was overtaken by an epileptic fit when fording a shallow stream; he fell down in the stream and was drowned. It was argued that "it was the fit which caused the drowning, for even after the insured had fallen into the stream he could have got his head out of the water but for the fit." The Court of Appeal. (Lord Coleridge, C.J., Baggallay and Brett, L.JJ.), however, held, that the insurance company was liable and that the death was not caused by an natural disease or weakness, but by the accident of drowning—that "those words in the proviso . . . point to an injury caused by natural disease as if for instance in the present case, epilepsy had really been the cause of death." There are two points of distinction between the *Wenspear* case and ours: (1) there the cause of death was being considered; in ours the cause of the happening of injuries; (2) there the epilepsy was not the cause of the presence of the water which drowned, here the epilepsy was the cause of the fire which burned.

The *Wenspear* case is referred to and followed in an American case. *Manufacturers Accident Co. v. Dorgan* (1893), 58 Fed. Rep. 945, in which an elaborate and careful judgment is given by the present President of the United States then Mr. Justice Taft. The deceased had been "overtaken by some temporary trouble" which caused him to fall into a brook upon whose banks he was at the time; he was drowned. The insurance company was held liable although the policy provided that they should not be liable for "accidental injuries or death resulting from or caused directly or indirectly wholly or in part, by or in consequence of fits, vertigo, etc., etc., or to any cause excepting where the injury was the sole cause of the disability or death."

This case goes no further than the *Wenspear* case. The other English case most strongly relied upon is *Lawrence v. Acc. Ins. Co.* (1881), 7 Q. B. D. 216. The policy did

not insure in case of death arising from fits—the insured standing at a railway station was seized by a fit and fell forward off the platform when a train was passing—this went over his body and killed him. It was argued for the company that “the accident actually arose from the disease,” p. 218, but the Court, Denman, J., held them liable. He says p. 219: “Now the immediate cause of death is not in the least disputable, but there is no doubt that if he had not fallen there in consequence of the fit he would not have suffered death and in that sense the fit led to his death. The question is whether that was merely one or several events which brought about the accident in the sense that it caused the accident to happen by causing him to be there, or whether it was within the meaning of this proviso a cause of death which would prevent the policy applying to the case.” In other words was the fit a *causa causans* or a mere *causa sine qua non* (so-called) or condition. Watkin Williams, J., agreed—quoting Lord Bacon’s *Maxims of the Law*, Reg. 1, “It were infinite for the law to consider the causes of causes and their impulsions one of another; therefore it contenteth itself with the immediate cause,” he says: “According to the principle of law, we must look at only the immediate and proximate cause of death, and it seems to me to be impracticable to go back to cause upon cause which would lead us back ultimately to the birth of the person for if he had never been born the accident would not have happened. The true meaning of this proviso is that if the death arose from a fit then the company are not liable, even although accidental injury contributed to the death in the sense that they both were causes . . . it is essential to that construction that it should be made out that a fit was a cause in the sense of being the proximate and immediate cause of the death before the company are exonerated, and it is not the less so because you can shew that another cause intervened and assisted in the causation.”

The same remarks apply to this as to the case in 6 Q. B. D.—the fit did not cause the train to come along—it was not the cause itself of the *causa proxima*.

To the same effect are the remarks of Collins, M.R., in *Wicks v. Dowell*, [1905] 2 K. B. 225, at p. 228, which case does not assist—nor am I able to derive any assistance from *Mardorf v. Accident R.W. Co.*, [1903] 1 K. B. 584.

If in the case in 6 Q. B. D. the falling of the insured had let in the water which drowned him—or in the case in 7 Q. B. D. the falling had automatically brought on the engine, the cases would be parallel with the present—but that is not the case and as a consequence these cases are not conclusive.

But there are cases in which the proximate cause is not accompanied by another cause (*causa sine qua non*) but has been actually caused itself by another cause, and it has been held that this last named cause is not to be considered as the *causa causans*—to use Lord Bacon's terminology we are not to look to the causes of causes. In *Busk v. Royal Exchange Ins. Co.* (1818), 2 B. & Ald. 73, the servants of the assured negligently lighted a fire in the insured ship whereby she was burned. The case was elaborately argued by Campbell and Bosanquet. Bayley, J., says (giving the judgment of the Court), p. 80: "In our law at least there is no authority which says that the underwriters are not liable for a loss the proximate cause of which is one of the enumerated risks but the remote cause of which may be traced to the misconduct of the masters and mariners." The very learned Judge refers to many authorities also in foreign laws and held "that the assured are entitled to recover as for a loss by fire, although that fire was produced by the negligence of the person having the charge of the ship at the time."

Mackie v. Maitland (1821), 5 B. & A. 171, at p. 175; *Bishop v. Pentland* (1827), 7 B. & C. 219, at p. 223; *Phillips v. Nairns* (1847), 4 C. B. 343, p. 350, 351; *Patapsco Ins. Co. v. Coulter* (1830), 3 Pet. S. C. 222, at p. 233; *Columbia Ins. Co. v. Lawrence* (1836), 10 Pet. S. C. 507, at p. 517; and *General Acc. Ins. Co. v. Sherwood* (1852), 14 How. S. C. 351, at p. 366, may also be looked at upon the general principle but must be read with caution as they have not the so-called remote cause always the cause itself of that which is proximate.

A nice distinction is indicated by Story, J., giving the judgment of the Supreme Court of the United States in *Waters v. Merchants, &c. Co.* (1837), 11 Peters S. C. 213. In that case barratry not being insured against, the Circuit Court divided in opinion and the Supreme Court was asked amongst other things.

1. Does the policy cover a loss of the boat by a fire caused by the barratry of the master and crew?

2. Does the policy cover a loss of the boat by fire, caused by the negligence, carelessness or unskilfulness of the master and crew of the boat or any of them?

The learned Judge says, p. 219, upon the first question. It assumes the fire was directly and immediately caused by the barratry of the master and crew as efficient agents.

. . . In this view of it we have no hesitation to say that . . . such a loss is properly a loss attributable to the barratry as its proximate cause as it concurs as the efficient agent with the element *eo instanti* when the injury is produced." But as to the second question, it was held that the negligence could be only *causa remota*.

In our own Courts the cases *Can. Casualty v. Boulter*; *Can. Casualty v. Hawthorne* (1907), 39 S. C. 558; 14 O. L. R. 166, are in point. There the policies contained a clause that they did not cover loss or damage resulting from freezing. A pipe connected with the sprinkler-tank system burst from freezing and the water ran down upon and injured the stock. The trial Judge, the C.J.K.B., gave judgment for the insured and this was sustained by the Court of Appeal and the Supreme Court—one Judge dissenting in each Court. The C.J.K.B. does indeed suggest that the freezing was the cause of the injury but not of the damage but that must be read in connection with the facts of the case—it would appear also that the use of the word "immediate" had some influence on the Supreme Court. But taking the case as a whole, I think it is authority for saying that the cause of an efficient cause is not itself an efficient cause or *causa causans*.

I think the appeal should be allowed in part and judgment entered to the plaintiff for \$10,750 and interest from the teste of the writ—the plaintiff should also have the costs of the trial, success being divided there should be no costs of the appeal.

The following have a more or less indirect bearing upon the matters discussed:—

Trew v. Riv. Pass. Assurance Co. (1859), 5 H. & N. 211, S. C. (1861), 7 Jur. N. S. 878 (Carn. Scacc.); *Reynolds v. Accidental Ins. Co.* (1879), 22 L. T. n.s. 820; *Re Etherington*, [1909] 1 K. B. 591; *Clover v. Hughes*, [1910] A. C. 242; *Dudgeon v. Pembroke* (1877), 2 A. C. 284; *Accident v.*

Crandall (1886), 120 U. S. 527; *Can. Rw. Accident v. Haines* (1911). 44 S. C. R. 386.

HON. MR. JUSTICE LATCHFORD (*dissenting*):—I think the finding of the learned trial Judge that the accident to the deceased happened because of a fit, is amply warranted by the evidence.

It is urged, however, that the death of Wadsworth resulted from burns and not from fits, and that therefore Part G. should not have been considered in determining the amount payable by the defendants.

The insurance is expressed to be “against bodily injuries caused solely by external violent and accidental means” as specified in a schedule.

In the first part of the schedule, under the heading “Schedule of Indemnities,” it is provided—“Part A.”—that “if any of the following disabilities shall result from such injuries alone within ninety days from the date of accident the company will pay in lieu of any other indemnity for loss of life . . . hands . . . feet . . . entire sight of both eyes . . . the principal sum.” This sum is \$5,000 under each of the two policies sued on, with an annual increase at the rate of five per cent.

Loss of life is thus defined as “a disability.”

A disability to form the basis of any claim against the company “shall result from . . . bodily injuries . . . caused solely by external, violent and accidental means.”

The foundation of the plaintiff's action is that her husband's death resulted from or was caused by injuries which were themselves caused by specified means. Mrs. Wadsworth was obliged to establish and did establish—that external violent and accidental means caused injuries to her husband and that injuries caused by such means caused his death.

So much it seems to me necessary to promise before coming to the consideration of the particular provisions of the contract around which the parties are contending.

The defendants allege and the plaintiff denies that “Part G.” of the schedule affects in the circumstances of the case the amount to which Mrs. Wadsworth is entitled. If it does apply the appeal fails; and the question whether it applies or not is upon the facts as found merely one of construction.

"Part G." has on principle to be construed upon a consideration of the whole contract. "A policy of insurance" is in the words of Lord Ellenborough in *Robertson v. French* (1803), 4 East at 133, "to be construed, like all other contracts, according to its sense and meaning as collected in the first place from the terms used in it, which terms are themselves to be understood in their plain, ordinary, and popular sense unless the context evidently points out that they must in the particular instance, and in order to effectuate the immediate intention of the parties to the contract, be understood in some other special and peculiar sense."

The main object and intent of the contract may be regarded as limiting any general words used having in view that object and intent. Halsbury, L.C., in *Glynn v. Margetson*, [1893] A. C. 351, at 355.

"Part G." cannot in any way be considered as in derogation of the object and intent of the contract. It is, as it purports to be, a part of the contract and fixes the amount payable when death (inter alia) occurs from injuries resulting in certain ways from any of certain stated causes. If the language is clear, it may be construed upon the principles I have referred to, and there is no good reason why it should be given what is sometimes called a benign interpretation.

So far as material here the provisions of "Part G." have reference to the case of injuries happening from any of the following causes, viz.; intentional injuries . . . fits . . . causing death, loss of sight or limb." "Causing" appears from the context of the whole clause to be in the same grammatical relation to "injuries" that "happening" is.

"Part G." clearly applies whenever injuries which cause death "happen" by accidental means from any of the specified causes, including a fit or "fits."

The injuries from which Wadsworth died happened from "fits" according to the finding of the trial Judge.

For the plaintiff it is contended that the "fits" must be shewn to be the immediate, proximate cause of death, before the defendants can invoke the provisions of "Part G" in their favour. So to construe "Part G." is, in my opinion, to subject it to a strain, which upon consideration of the whole contract it cannot bear.

"In case of injuries" in Part G. has reference manifestly to injuries of the kind insured against—injuries resulting in disability, and "caused solely by external, violent and accidental means." The succession of events directly resulting from the paroxysm—the overturning and breaking of the lighted lantern, the escape and ignition of the oil, the flames which enveloped Wadsworth, his inability owing to unconsciousness to give any alarm or extinguish his burning clothing—all are, in my opinion, but "means," within the true intendment of the policy, lying between the fit as a cause and the injuries as an effect of that cause. This conclusion appears all the more reasonable if one considers some of the "causes" enumerated in the same category as "fits." "Sleep-walking," for instance, cannot be the immediate cause of "injuries causing death, loss of sight or limbs." Some accident must intervene, some means must lie between the mere somnambulism and any serious injury caused while in that state.

No support is I think given to the plaintiff's contention by the cases which have been cited on her behalf. They are but illustrations of the application of the maxim, *in jure non remota causa sed proxima spectatur*, and they apply in matters of contract wherever the agreement either expressly or by implication provides that the immediate cause must be looked to.

The many cases in which liability of insurers for loss caused by fire has been considered are authority for the proposition that where such a loss has been insured against, it is immaterial that the fire itself was caused by the negligence of the agents or servants of the assured. The fire was the proximate cause of the loss sustained, and the cause of that cause could not be regarded. But if the policies had provided that there should be no liability in case the fire resulted from such negligence the decisions referred to would have been given for the defendants.

The case is not to my mind one in which it is necessary to consider whether the epileptic paroxysm was or was not the immediate and proximate cause of death. If it were, I should feel myself bound by *Wenspear v. Accident Ins. Co.* (1880), 6 Q. B. D. 42, and *Lawrence v. Accident Ins. Co.* (1881), 7 Q. B. D. 216. In both of these cases, as Lord Collins points out in *Horsey v. White*, [1900] 1 Q. B. 481, at 485, there was a fortuitous unexpected element—the

presence of a stream in the one case and of a moving railway train in the other—which turned a normal condition of affairs into a catastrophe. The fit did not cause the stream to drown Wenspear. His condition did not cause the stream to flow where it was flowing when he fell into it. Lord Collins points out that it was just as though the epileptic had been struck by lightning while lying on the ground. Nor did the fit in the Lawrence case cause the train to run which passed over the neck and body of the deceased. The decision in *Horsey v. White* as to what is an “injury by accident,” within the meaning of the Workmen’s Compensation Act 1897, was overruled in *Fenton v. Thorley*, [1903] A. C. 443, but that circumstance in no way affects the force of observations I have quoted.

And the reason occurs to me why the Wenspear and Lawrence cases are distinguishable. In both (as here) the insurance was, *inter alia* against death by accident. But in each there was an exception that there should be no liability in certain circumstances. The defendants were obviously liable unless they could clearly bring themselves within the exceptions which upon well recognised principles were to be construed most strongly against the defendants. The exceptions were held not to be open to the defendants because the accidents were not caused directly and proximately by the excepted causes. In the present case the clause “Part G.” relied on by the defendants is not in the nature of an exception. It is as much a term of the contract as the “face,” as it has been called, of the policy, and simply states circumstances in which the amount of the company’s liability is to be one sum instead of another fixed by a different form of the policy. Moreover the fit as I have stated was the cause *causans* of the breaking of the lantern and of the consequent injuries and death. If in the Wenspear case, the assured had because of the fit let loose a flood of water which overwhelmed him or in the Lawrence case the assured had because of the fit started the engine which killed him—the decisions notwithstanding the rules of construction applicable to exceptions would have been different.

I am unable to see any reason either upon principle or authority why the judgment appealed from should not be affirmed.

COURT OF APPEAL.

MARCH 6TH, 1912.

REX v. SOVEREEN.

3 O. W. N. 779; O. L. R. ; Can. Cr. Cas.

Criminal Law — Practice and Procedure — Election of Accused for Speedy Trial—When is it to be Exercised?

COURT OF APPEAL, *held*, that after a true bill has been found, against the accused, by the grand jury, but before arraignment or plea, it is too late for him to elect to be tried without a jury under the speedy trials sections of the Criminal Code.

R. v. Wener, 12 Que. K. B. 320; 6 Can. Cr. Cas. 406. and

R. v. Komienksy, 12 Que. K. B. 329; 6 Can. Cr. Cas. 524, followed.

R. v. Thompson, 17 Man. L. R. 608; 8 W. L. R. 3; 14 Can. Cr. Cas. 27, disapproved.

Reserved case stated by HIS HONOUR JUDGE ROBB, the chairman of the General Sessions of the Peace for the county of Norfolk.

The accused Wilbert Sovereign was indicted before that Court in December, 1911, for that he on the 23rd day of July, 1911, and on other days and times before that date did keep a disorderly house, that is to say, a common bawdy house contrary to secs. 228 and 225 of the Criminal Code. The jury found him guilty, and he was convicted.

He had been committed for trial by a magistrate, but the indictment on which he was convicted was not preferred by the person bound over to prosecute, but by the county attorney with the written consent of the trial Judge under sec. 873 of the Criminal Code.

After a true bill had been found by the grand jury but before arraignment or plea the prisoner desired to elect to be tried before the county Judge without a jury under the Speedy Trials Act (Part XVIII. of the Criminal Code). On His Honour holding that he was not entitled so to elect, he pleaded not guilty. At the close of the trial His Honour, on the application of the prisoner's counsel, reserved for the opinion of the Court of Appeal the following questions:—

1. "Was there any valid evidence that the prisoner was the keeper of a disorderly house?"

2. "Was my charge erroneous as regards the reference made therein to the woman who had been previously convicted?"

3. "Was the prisoner in the circumstances above stated entitled to make an election for speedy trial?"

The case in the Court of Appeal was heard by HON. SIR CHARLES MOSS, C.J.O., HON. MR. JUSTICE GARROW, HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MAGEE, and HON. MR. JUSTICE LATCHFORD.

J. B. Mackenzie, for the prisoner.

J. R. Cartwright, K.C., for the Crown.

HON. SIR CHARLES MOSS, C.J.O.:—We are all agreed that the questions submitted by the learned Chairman of the General Sessions should be answered adversely to the contentions made on behalf of the prisoner.

As to the first and second questions having regard to the evidence and the charge to the jury which are made part of the stated case there can be no reasonable doubt.

The third question affords more room for difference of opinion, not however, as to what the proper conclusion should be, but rather as to grounds upon which it should be based.

Speaking for myself and with the utmost respect for those who have indicated or expressed a different view, I think that when, as here, a person committed for trial, and whether in custody or upon bail has not, before a bill of indictment has been found against him by a grand jury, taken the steps necessary to enable him to elect to be tried by a Judge without a jury he is not entitled upon bill found and arraignment thereon to ask to be allowed to elect to be tried without a jury. If that is not the effect of the legislation it places it in the power of the accused not merely to postpone his trial, but to render futile all that has been done by the grand jury, and necessitate a compliance with all the forms prescribed by sec. 827 of the Code, including the preparation and preferring by the prosecuting officer of a charge in accordance with the directions given in sec. 827 (3).

I am unable to think that it was the intention to give an accused person the general right to elect to be tried without a jury. On the contrary I think that the intention was to give it only in cases in which the exercise of such an election would or might effect a speedy trial of an accused person and thereby save the delay which waiting for a trial by jury might involve.

And I do not think the legislation extends the right beyond that point.

I agree that the first question should be answered in the affirmative and the second and third in the negative and that the conviction should stand.

HON. MR. JUSTICE GARROW and HON. MR. JUSTICE LATCHFORD:—We agree.

HON. MR. JUSTICE MACLAREN:—As to the first question, I am of opinion that there was ample evidence, if believed by the jury, to prove that the house in question was a disorderly house and that he was the keeper. The house belonged to him and also the furniture and he used it when working the farm with which it was connected which was some two or three miles from his homestead. The evidence points strongly to his having been a joint occupant or keeper with the woman said to have been convicted in October, 1910; and to his being the sole keeper after that time, the house being occupied from time to time by disreputable women. The house retained the same character and reputation after October, 1910, as before, and the admissions made by the witness who did the chores about the house for the prisoner—and made very reluctantly—are quite sufficient alone to justify the conviction. This question should be answered in the affirmative.

As to the second question, what the trial Judge said in his charge on the subject was this: "It has been suggested that the woman who has been already convicted was the keeper, but I think that we have nothing to do with that in this case. I think that no matter whether she was convicted or not you have got to try this case upon the evidence that has been presented before you; and if you come to the conclusion that the prisoner is the keeper or at any time the keeper of this house, you should find him guilty, giving him, of course, the benefit of any doubt that you may have." I fail to see on what grounds the prisoner could properly complain of this charge. This question should, in my opinion, be answered in the negative.

The third question should also in my opinion be answered in the negative. Part XVIII. of the Criminal Code (secs. 822 to 842 inclusive), relating to "Speedy Trials of Indictable Offences," has reference exclusively to prosecutions based

upon an information or complaint and a preliminary examination before a magistrate. It is true that there was in this case a preliminary examination before a magistrate, and the prisoner was committed for trial. But this was not followed up by an indictment based upon the charge for which he was committed, "or for any charge founded upon the facts or evidence disclosed on the depositions taken before the Justice," as might have been done under the provisions of sec. 871 of the Criminal Code. It does not appear from the reserved case whether or not the complainant before the magistrate was present at the sessions; but whether or not, the county Crown-Attorney might prefer an indictment for the charge upon which the prisoner was committed or for any charge founded on the facts or evidence disclosed in the depositions: Criminal Code, sec. 872. The Deputy Attorney-General informed us at the argument that his instructions were that no one was bound over to prosecute, although the reserved case would lead one to infer that some one had been so bound; but in my opinion in the circumstances of this case this was quite immaterial.

The fact is that the depositions and the committal were both ignored and were not followed by the person bound over to prosecute if there was such a person or by the county Crown-Attorney. Instead of this the county Crown-Attorney under sec. 873 obtained the written consent of the Judge to prefer the indictment set out in the reserved case, on which a true bill was returned by the grand jury, and on which the petit jury returned a verdict of guilty. The depositions taken before the magistrate were not made a part of the reserved case and counsel for the prisoner did not before us ask or even suggest that they should be made a part of it. In the circumstances we must, I think, assume that the charge in the indictment is not the same as that for which the prisoner was committed or any other charge appearing in the evidence before the magistrate, as in either of these events the county Crown-Attorney would not, under sec. 871 have needed the consent of the Judge to prefer the indictment.

It is quite clear from sec. 825 and the succeeding sections of the Code that a speedy trial before a Judge can only be had upon a charge on which the magistrate has committed the accused or upon one which appears in the evidence before him. As said by Wurtele, J., in *Rex v. Wener*, 12 Que. K. B.

320; 6 Can. Crim. Cas. 406, at p. 413, "The Criminal Code does not prescribe that an accused can elect to be tried without a jury, when, without a preliminary enquiry or without a committal or an admission to bail, and subsequent custody for trial, a bill of indictment has been preferred by the Attorney-General or by any one by his direction, or with the written consent of a Judge of a Court of criminal jurisdiction, or by order of such Court, and thus remove the prosecution from the forum to which it properly belongs to another to which jurisdiction has not in such case been given by law. In the absence of any statutory provisions or statutory authority an accused has no right in such a case to demand and obtain a trial, in any other Court than the one in which the indictment was found, and which has jurisdiction over the case, and is seized with it." As stated above, the indictment in this case did not originate with, and is not based upon a charge or depositions taken before a magistrate, but is based solely upon the written consent given by the trial Judge, and the Code does not provide for a trial before a Judge without a jury in such a case.

But even if the indictment had been based upon a charge for which the accused had been committed or which appeared in the depositions, I am of opinion that he should have elected before the true bill was found by the grand jury. I agree with what is said by Wurtele, J., in the Wener case at the page above cited. He there says: "If no election has been made before an indictment is returned founded on the facts or evidence disclosed by the depositions taken at the preliminary enquiry, the accused has no statutory right to demand a trial before a Judge of Sessions without a jury and avoid a trial on the indictment." In another case of *Rex v. Komiencky*, 12 Que. K. B. 329; 6 Can. Crim. Cas. 524, at p. 528, the same Judge says: "On the finding of true bills, the Court is finally seized with the prosecution, and exclusive jurisdiction over them is vested in the Court, which is the only competent *forum* or tribunal to carry them in due course and in the ordinary way to their final stage of either conviction or acquittal by the petty jury." On the other hand in a Manitoba case, *Rex v. Thompson*, 17 Man. L. R. 608; 8 W. L. R. 3; 14 Can. Crim. Cas. 27, it was held by Howell, C.J., that a prisoner may elect up to the time of pleading. I can find nothing in the Code to justify this position, and in my opinion, it is quite contrary to the genius

and spirit of the Speedy Trials Act (now Part XVIII. of the Code). I am of opinion that the correct doctrine is that laid down as above by Wurtele, J. To hold otherwise would be to defeat the very object and purpose of the legislation, and the title of "Speedy Trials" would become a veritable misnomer, and provisions that were designed and enacted to speed trials would be converted into machinery to retard and delay.

But there is also in addition another difficulty in the way of the prisoner. Having been bound over under sec. 696, and being under bail, if he desired to elect he should have given the notice of such desire to the sheriff as required by sub-sec. 6 added to sec. 825 of the Code, by the amending Act of 1909, 8-9 Edw. VII., ch. 9. This he did not do, so that he did not take the first step to secure such right. It may be said that this objection is a technical one. But if the prisoner is claiming a privilege so much at variance with the spirit and object of the legislation he should at least shew some compliance with the plain provisions laid down in the legislation.

For these reasons, and especially on the ground first set forth, which in my judgment is quite sufficient, I am of opinion that the third question should be answered in the negative.

HON. MR. JUSTICE MAGEE:—Under sec. 228, this is an indictable offence. There is no limitation of time for the commencement of prosecutions for it. Consequently it was open to adduce evidence such as was given going as far back as May, 1910—it was objected that such evidence was inadmissible because under sec. 1142 in the case of an offence punishable upon summary conviction the complaint must be made or information laid within six months and under sec. 774 (amended by 8-9 Edw. VII., ch. 9), a "magistrate" as defined in sec. 771 could without the assent of the accused summarily try a person charged with keeping a disorderly house. But Part XVI., which includes sec. 774 relates to indictable offences and not to offences punishable under summary convictions, which are dealt with by Part XV. The only provisions of the Code under which the keeper of a disorderly house or bawdy house can be punished by summary convictions are secs. 238 and 239, the former of which declares every one who is the keeper of such a house to be a

loose, idle, or disorderly person or vagrant, and sec. 239 makes a loose, idle, or disorderly person liable to fine or imprisonment or both. But that punishment is not for keeping the house, but for being a loose, idle, or disorderly person or vagrant. In *R. v. Stafford* (1898), 1 Can. Cr. Cas. 239, although the charge was for being "the keeper of a common bawdy house," it is evident the proceedings must have been taken under the sections then corresponding to secs. 238 and 239, and the imprisonment was held to be unauthorized by them. As the offence here charged is only punishable by indictment, sec. 1142 does not apply.

It was shewn that the defendant was the owner of the house in question, which was situate on a parcel of 45 acres of land owned by him. He resided about two and a half miles away. The house was "formerly occupied" by one Mrs. Deuby. There is some reference to the fact of her having been arrested and convicted, but for what does not appear. Presumably it was for keeping this disorderly house. She left in October, 1910. During her occupancy there is evidence of other women being there at various times and men, and of the evil reputation of the house and of instances of prostitution by inmates and of lewd conduct by this defendant with Mrs. Deuby and another woman, and of his been "hundreds of times" in the bedroom with the former and of his having invited there one witness, who was there several times and says the house was one of ill-fame, and that this defendant and Mrs. Deuby were the keepers—the people who were running the house. As to this the witness was hardly cross-examined. This was clearly "some valid evidence" to shew that the defendant was a keeper of a common bawdy house—under sec. 228.

Since October, 1910, the house though furnished by the defendant has been vacant unless when he occasionally stopped there—the presence of one or two women there on these occasions weeks apart is shewn, but not the time of day except once at night nor the length of their stay. Both of them had been there in Mrs. Deuby's time. There is no evidence of any improper conduct or of other men being there. There is not I think sufficient proof of the existence of a common bawdy house there during this period.

In his charge to the jury the learned chairman after pointing out that the defendant was the owner of the house said, "It had been suggested, however, that the woman who

had already been convicted was the keeper, but I think, that we have nothing to do with that in this case. I think that no matter whether she was convicted or not, you have got to try this case upon the evidence that has been presented before you." I am at a loss to discover any objection to this or indeed why the learned chairman was indulgent enough to reserve any question upon it.

Another question remains as to the right of the Court to try the defendant. The statement of the case sets out these facts. "The prisoner had been committed for trial after the preliminary hearing and admitted to bail and appeared as provided by his recognizances for trial at the above named General Sessions of the Peace. The bill of indictment was, however, not preferred by the person bound over to prosecute, but was preferred under directions given by the trial Judge as provided by sec. 873 of the Criminal Code. Before arraignment or plea the prisoner desired to elect trial by the County Judge, but it was held that he was not entitled under the circumstances to so elect."

I assume that the information laid, the preliminary hearing had, and the defendant's recognizance to appear for trial were all upon the same charge as the indictment. It is only under sub-secs. 6 and 7 of sec. 825 of the Criminal Code 1906, as added in 1909 by 8-9 Edw. VII., ch. 9 that the defendant being not in custody, but under bail could have claimed any right to a trial before a Judge without a jury. previously he would have had to be in actual custody either upon the original commitment for trial by the magistrate holding the preliminary inquiry or by virtue of a surrender into custody after bail or "otherwise in custody awaiting trial on the charge."

The new sub-sec. 6, provides that a person accused who has been bound over by a Justice under sec. 696 (i.e., to appear for trial), and is at large under bail, may notify the sheriff that he desires to make his election under Part XVIII (relating to speedy trials), and thereupon the sheriff shall notify the Judge, and by sub-sec. 7 the Judge having fixed the time and place for the accused to make his election the sheriff shall notify the accused thereof and the accused shall attend, and the subsequent proceedings shall be as in other cases under Part XVIII, and by sub-sec. 8 the recognizance taken when the accused was bound over shall be obligatory with reference to his appearance at the time and place so

fixed, and to the trial and proceeding thereupon as if originally entered into with reference thereto.

No time is specified for the giving of the notice to the sheriff. If a notice were given in such a case it would be material to consider at what time an election may be made by those in custody. The original Act providing for trials by a Judge without a jury 32-33 Vict. 1869, ch. 35, was entitled "An Act for the more speedy trial in certain cases of persons charged," etc.—afterwards called the Speedy Trials Act, and this might give some colour to the idea that where the trial would not be speeded the Act was not intended to apply. But excepting in the title there was nothing in the wording of the Act itself to so indicate except possibly the provisions that the prisoner might with his own consent be tried "out of sessions," and that the Judge was to tell him that he had the option to remain untried until the next sittings" of the Court of General Sessions or Oyer and Terminer. These words did not in fact, I think, imply that the speedy trial must be before the session of the jury Court began—but subsequent amendments removed any possibility of such a construction. It must, I think, be taken that the object of speedy trials indicated by the title was to be attained by the creation of a new tribunal—a Court of Record—which would not be limited to half yearly or other periodical sittings but could sit at any time, and that tribunal being created (see Ont. Stat. 1873, 36 Vict., ch. 8, 357, 358), the positive directions to the sheriff and the Judge as to their duties towards prisoners in effect gave each prisoner to whom the Act applied an option and right of election as to which one of the tribunals he would be tried by or rather the right to have an opportunity to say he chose trial by the Judge. I do not think it would have been any answer to a claim to exercise such right to say to the prisoner "the jury Court is now sitting and your trial there can take place to-day or sooner than if you are to be tried by the Judge alone." It is now expressly declared in sec. 825 that the trial by the Judge shall be had whether the jury Court or the grand jury thereof is or is not then in session—and I agree with the opinion of Howell, C.J.A., in *R. v. Thompson*, 17 Man. L. R. 608; 8 W. L. R. 3; 14 Can. Cr. Cas. 27, that this provision is not restricted to the trial itself. Then by sec. 828, even after a prisoner has elected to be tried by a jury, he may notify the sheriff that he desires to re-elect, and this at any

time before his trial has commenced and whether an indictment has been preferred against him or not—unless the Judge is of opinion that it would not be in the interest of justice to allow a second election, and if an indictment has been actually preferred the consent of the prosecuting officers must be obtained.

In cases where under Parts XVI. or XVII. the prisoner had elected before the committing magistrate not to be tried by him, but by a jury, he may under sec. 830 notify the sheriff before the sitting of the jury Court that he desires to re-elect. The Code, therefore, gives three periods for the election by actual prisoners as of right—before the sitting—before the preferment of the bill, and before the trial has commenced. It would be difficult to say which of these should apply to the case of an accused person, who is at large under bail, but I think it is clear that his notification to the sheriff must be taken as the foundation of his right to put himself in the position of a prisoner as one entitled to be called upon to elect. That he was not in actual custody merely by reason of appearing “as provided by his recognizance” is manifest from sec. 1092, which declares that a recognizance is not discharged by arraignment or conviction.

This defendant did not give any such notice so far as appears, but at the last moment when called upon to answer to the indictment claimed that he desired to elect. Without being in custody and without having given the notice to the sheriff he had not put himself in the position to claim that right. It appears that the chairman of the Court of General Sessions held “that he was not entitled under the circumstances” to so elect. Therein the chairman was right, as no notification had been given. The defendant then pleaded to the indictment or a plea must have been entered for him as the trial proceeded, and he was by the jury found guilty. There is nothing to indicate that any other result might have been arrived at if the chairman had been trying the case without a jury, and there is no reason to suppose that there was any failure of justice through the defendant’s omission.

I would answer the first question in the affirmative, the second and third in the negative.

COURT OF APPEAL.

MARCH 6TH, 1912.

RE BRUSSELS AND MCKILLOP MUNICIPAL TELEPHONE SYSTEM.

RE BLYTH AND MCKILLOP.

3 O. W. N. 781; O. L. R.

*Telephone—Ontario Railway and Municipal Board—Jurisdiction —
To Order Connection of Systems in Adjacent Territories —
Ontario Telephone Act (1910) ss. 8, 9—Agreement for Connection with Bell Telephone Co.*

The villages of Brussels and Blyth made application to the railway and municipal board for an order for connection, intercommunication or reciprocal use in the transmission of business between the telephone systems of the applicants and the McKillop municipal system, upon the terms and conditions mentioned in the agreement submitted to the respondents, or upon such terms as the board might be pleased to order and direct. The board ordered the connection asked.

COURT OF APPEAL allowed the appeals and set aside above orders with costs, holding that what cannot be done directly cannot be permitted to be done indirectly, viz., defendants held an agreement with the Bell Telephone Co. for reciprocal connection which had been approved by the board prior to above applications, and while that agreement stands the board is without power or jurisdiction to alter or vary it, which above orders would do indirectly if allowed to stand.

Appeals by the McKillop Municipal Telephone System and the township of McKillop from orders of the Ontario Railway and Municipal Board, dated 10th March, 5th May, and 20th June, 1911.

The appeals to the Court of Appeal were heard by HON. SIR CHAS. MOSS, C.J.O., HON. MR. JUSTICE GARROW, HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MEREDITH and HON. MR. JUSTICE MAGEE.

M. K. Cowan, K.C., and R. S. Hays, for the defendants, appellants.

W. M. Sinclair, for the village of Brussels.

H. D. Gamble, K.C., for the village of Blyth.

HON. SIR CHAS. MOSS, C.J.O.:—These are appeals from orders or decisions pronounced by the Ontario Railway and Municipal Board. So far as the respondents to the appeals are concerned the matters are separate and distinct but substantially these same questions are involved and the appeals,

which were heard during the same sittings of the Court, may be conveniently dealt with together.

The first two in point of time of the orders complained of were pronounced upon an application made by the corporation of Brussels on which they named as respondents, the McKillop Municipal Telephone System. This was not a proper proceeding. While it seems that there is an association of individual subscribers who for convenience act under that name it does not appear that there is any corporate body or company known to the law capable of responding by that name to the application made by Brussels to the Board for the orders now in question. Having been constructed and installed in 1908 under the provisions of the Local Municipal Telephone Act 1908, the system and all other works and property acquired, erected or used in connection therewith became vested in the municipality of McKillop in trust for the benefit of the subscribers.

The opposition to the application was made through the municipality but it may be questioned whether in the form in which the proceedings now stand the orders made could be effectively enforced if capable of enforcement under any circumstances.

But more formidable objections appear when the substantial questions between the parties are examined.

The respondents the corporation of the village of Brussels as trustees for the subscribers of the local telephone system known as the Brussels, Morris and Grey Telephone System made application in October, 1910, to the Ontario Railway and Municipal Board for an order for connection, intercommunication or reciprocal use in the transmission of business between the telephone systems of the respondents and the appellants. The applicants alleged that their system was located in the territory immediately adjacent to the appellants and that they had been for some months previous to their application desirous of entering into an agreement with the appellants for such connection, intercommunication or reciprocal use but the latter had declined to do so. Apparently the application was based upon sec. 9 of the Ontario Telephone Act 1910, 10 Edw. VII. ch. 84, which seems to be the only enactment that appears to afford any warrant for the application.

It is very difficult, however, to give an intelligible meaning to the language of the section. Read literally it does

not comprehend this case; on the contrary it would seem to be providing for some case of a company or person as defined by sec. 2 (c) of the Act having two or more systems or lines located in territory adjacent to each other. Doubtless this was not the intention but in its present form the real intention is not clearly expressed. The order of the Board dated March 10th, 1911, which directs connection, intercommunication, joint operation, reciprocal use and transmission of business purports to be made in pursuance of sec. 9, but as pointed out above that section is halting and uncertain in expression, and in strictness it does not confer jurisdiction in this particular case. There still remains the question of jurisdiction dependent upon the existence of an *agrément* between the appellants and the Bell Telephone Co., substantially for the purposes recognised and authorised by sec. 8 of the Ontario Telephone Act 1910, and which had been approved of by the Board prior to the application by Brussels.

The appellants and the Bell Telephone Co. were working under this agreement when the orders now in question were made by the Board. It is said that there was no intention to interfere with that agreement and that there is in fact no interference with it.

But it is obvious that compliance with the order by the appellants does seriously alter their relations to the Bell Telephone Co. It exposes them to the consequences of a breach of the agreement, and may deprive them of the benefits and advantages which they now enjoy under it.

And while the agreement remains as an existing agreement sanctioned and approved of by the Board the Bell Telephone Co. are entitled to assert their rights under it and to claim that they should remain undisturbed and unaffected as long as the agreement stands. The Board has undoubted power to rescind the order for good cause but the jurisdiction to do so should only be exercised upon a properly framed application for that purpose to which all those who are interested are parties or of which they are properly notified.

At present the agreement is a valid subsisting agreement and while upon an application regularly framed and constituted as to parties the Board may determine its true meaning yet while it stands the Board is without power or jurisdiction to alter or vary it.

Another important question is whether the Board has in the present state of the legislation any power or jurisdiction to order the performance of work of construction and connection with the Brussels system involving the expenditure of money upon capital account by the subscribers to the appellants' system. There are no express provisions covering such a case, and the different sections to which we were referred by counsel for the respondents fall far short of supplying the necessary machinery for imposing or collecting funds to meet the outlay which obedience to the orders impose.

Apart from these latter considerations, however, the want of jurisdiction to deal with the application made on behalf of Brussels based upon the other grounds referred to is sufficient reason for allowing the appeal.

There is no difference in substance between the case of Brussels and the case of the application by the corporation of the village of Blyth.

Except as to the frame of the application with respect to the parties respondent, all the objections to the power and jurisdiction of the Board apply with the same force as in the Brussels case.

The order complained of in the Blyth case is to the same effect as that pronounced in the Brussels case.

The appeal is upon the same grounds and the result should be the same.

Both appeals should be allowed and the orders complained of be set aside with costs to the appellants in each case.

HON. MR. JUSTICE GARROW concurred in the result.

HON. MR. JUSTICE MACLAREN (*Brussels case*):—This is an appeal by the township of McKillop representing the subscribers to the municipal telephone system of the township on leave granted by the Court from an order of the Ontario Railway and Municipal Board of the 10th of March, 1911, ordering the respondents to build and operate a switchboard in or adjacent to the town of Seaforth and a trunk telephone line therefrom to a point half-way between Seaforth and Brussels there to connect with the Brussels line to the village, and from an order of said Board of the 5th of May, 1911, refusing to vary or rescind the order of the 10th of March.

The respondents were organised under sec. 11 of the Municipal Telephone Act 1908, but have no switchboard of their own, their switching being done by the Bell Telephone Co. in Seaforth, under an agreement which was duly approved by the said Board in accordance with the provisions of sec. 10 of the Ontario Telephone Act 1910, ch. 84. Section 11 of this Act provides that no company or person owning such a telephone system or lines shall enter into any contract, agreement or arrangement with any other company having authority to construct or operate a telephone system or line restricting competition in the supply of such service unless the same is just and reasonable and until such contract, agreement or arrangement has been submitted to and received the assent of the Board. The said agreement contained a provision that during its continuance the respondents should not connect their telephone system with the system of any company or persons operating in competition with the Bell Company, and without the consent of the Bell Company, and it appeared that the applicants in this matter operated in opposition to the Bell Company and that the latter refused the respondents the right to connect their system with that of the applicants.

The applicants relied upon a clause in the approval of the Board to the effect that the right of revoking or varying the order was reserved: but in my opinion such reservation does not confer any greater power upon the Board than is found in the Ontario Railway and Municipal Board Act 1906, ch. 31, sec. 18 (4) which says that "The Board may review, rescind, change, alter, or vary any rule, regulation order or decision made by it."

By sec. 14 of the Telephone Act 1910, ch. 84, it is expressly enacted that the Board shall not have the power "to alter or vary any agreement between a municipal corporation and a company or between two or more companies or persons." What they cannot do directly I do not think they can do indirectly or by a sidewind as is attempted by the orders now appealed from.

The agreement between the McKillop Telephone subscribers which must have been found to be just and reasonable by the Board when they gave it their approval, should stand until after proper notice to the parties they have an opportunity of stating their objections to the variance or

revocation of such approval. So long as such approval stands unchanged and unrevoked I am of opinion the Board is without jurisdiction to pass such orders as are now in appeal.

I do not consider it necessary at present to consider the other matters argued before us or to express any opinion as to whether or not the orders in question would be a compliance with the provisions of sec. 9 of the Telephone Act, 1890, even if the above objection did not exist.

In my opinion the appeal should be allowed.

(*Blyth case.*) The same objection applies to the order of the Ontario Railway and Municipal Board in this case as in the case of *Brussels v. McKillop*, and for the reasons therein given I am of opinion that the appeal should be allowed and the order set aside.

HON. MR. JUSTICE MEREDITH (*Brussels case*):—The appellants have a local telephone system which satisfies all their needs; and they are naturally opposed to any action which would disturb that system or the very satisfactory arrangements made between them and the Bell Telephone Company under which the appellants' lines are operated by the company and under which the subscribers to the appellants' system are also given intercommunication with the company's subscribers: and under which arrangements the appellants are bound not to make connection with any other system.

Upon an application made by the respondents to the Ontario Railway and Municipal Board, which was heard by one member of the Board only, an order was made requiring the appellants to connect their system with that of the respondents, and to give intercommunication between the subscribers of each, and, for that purpose, to build and operate a trunk line and a switchboard, which would of course also necessitate providing a room, light and heat sufficient for the purpose. The order, if obeyed, would compel the appellants to break their agreement with the Bell Telephone Company and put an end to all their rights and benefits under it, obliging them to operate their own lines at very considerable continual expense, in addition to the very considerable expense of doing the work ordered to be done by them; entirely reversing their policy in the operation of their lines and making the operation much more

costly as well as depriving them of the benefits of inter-communication with the Bell Telephone Co.'s subscribers; unless indeed that company should see fit to make some other agreement with them, which neither they nor the Board would have any power to compel.

If the board had the power to do this injustice, the appellants must submit to it, as well as must the Bell Telephone Co., for in that case there would be no right of appeal; but if the Board had no such power this Court can and must relieve the appellants from it; and the power to make such an order ought to be made to appear with very reasonable clearness to be upheld in this Court: but I am unable to find, in all the legislation upon the subject, sufficient authority to support it. The first question that strikes the mind in dealing with the case is: Where is the money to come from which must be expended in obeying the order? And it must be borne in mind that, if the power exist, there is no limit of the amount which the Board may thus require to be expended; it may be little in one case, but it may be very great in another, and that quite apart from any damages anyone might be compelled to pay for breach of contract such as that involved in this case. I have been unable to find any source from which the money which must be paid out if the order in appeal be complied with; and I cannot help thinking that if the subscribers to such systems could be so made personally liable they might go a long time without the advantages of a telephone rather than run the risk of being burdened with the cost of doing that which is altogether against their wishes, and that which they believe to be their best interests, upsetting their whole plan of operation, compelling a breach of their contract with whatever consequences might follow from it, as well as requiring them to do that which they have carefully provided against, operate their own system. The cost of constructing and maintaining a system is to be paid by the "initiating municipality" and may be recovered from the subscribers in the manner provided for in the enactments, but such "cost" must, I think, under the words of the enactment as well as the reasonableness of the thing, be limited to the construction and maintenance of the system as contemplated and desired by the subscribers and which they have petitioned the municipality to undertake for them, and not a different system which they do not desire but

which some other system endeavours to force upon them; and, of course, there is no warrant for compelling the municipality to pay without recoupment.

It may very well be that the Board would have power to order connection and intercommunication, where the applicants were willing to pay the cost of making the connection and where it could be done without inflicting upon any party such injustice as the appellants reasonably complain of in this case. I can find no sufficient authority for an order which has the effect of the order made in this case; nor is there any need for it.

There is no good reason why the respondents should not make arrangements with the Bell Telephone Co. similar to those made by the appellants with that company, arrangements which evidently could be made at much less cost and which would not only give respondents all they sought in this application but also intercommunication with the company's subscribers as well; but that they would not do because, I have no doubt, of some feeling against, an concerted opposition to, that company, to give effect to which the appellants are to be driven from their alliance with it and compelled, at great loss, to establish switching stations and operate its own lines as well as to lose the benefits of intercommunication over the Bell system, and take the consequences of a breach of the agreement with them.

For two other reasons I am also of opinion that the order cannot stand; (1) there was no power in one member of the Board to hear the application and make the order; and (2) the application should have been made against the municipality, not against a "system" which is not a legal entity; and there is still another reason which I shall mention in dealing with the like case of Blyth and McKillop.

The order should, I think, be rescinded for want of jurisdiction.

(*Blyth case.*) This case is quite the same as that of *In re Brussels and McKillop System*, in which I have just expressed my opinion, except in these respects: (1) the initiating municipality is properly proceeded against; and (2) the application was heard, and the order made, by the full Board: and, therefore, all that I have said in the other case except in these respects, applies fully to this case; but I desire to add a few observations now applicable alike to each case.

The Bell Telephone Co. are materially affected by the order; and, according to first principles in the administration of justice, ought to have been given an opportunity for being heard upon the application; they might have desired to oppose it upon the merits, if the Board had jurisdiction; and they might also have desired to contend, and possibly might have been able to convince the Board, that the order sought would be one substantially affecting rights in them over which, not being a provincial corporation, the Board had no power; see sec. 2 (c) of the Ontario Telephone Act, 1910.

This appeal should therefore be dealt with in the same manner as the other.

HON. MR. JUSTICE MAGEE:—Looking at the provision for extension in secs. 5, 7, and 11 of the Local Municipal Telephone Act, 1908, and the provision for connection and switchboard in secs. 10 and 11, and the amendments in 1910 and 1911 by 10 Edw. VII. ch. 92, secs. 1 & 4, and 1 Geo. V. ch. 56, sec. 2 (13A, 5, 6), I am inclined to think the council would be entitled to collect from the subscribers any additional cost imposed upon it by law. It would appear to be one of the risks run by those who invoke for their private convenience the authority of the municipality to use the highways for the poles and lines and break, dig, and trench the same or private property, that they may be called upon to submit to more extension and expense and a wider connection than they originally contemplated. As the municipality is, under sec. 10, authorised to enter into agreements for connection with other systems, I would think that under sec. 4 of the Ontario Telephone Act, 1910, the Board would have power to order it to do so. But for the other reasons stated by my Lord the Chief Justice I agree that the appeals should be allowed.

HON. MR. JUSTICE MIDDLETON.

MARCH 1ST, 1912.

GOODFRIEND v. GOODFRIEND.

3 O. W. N. 784.

*Husband and Wife—Alimony—Desertion by Husband Going to Live
Where Wife Cannot Follow—Costs.*

MIDDLETON, J., *held*, that wife was entitled to alimony where her husband (who was ill) went to live with his family. This conduct amounts to desertion for he has no right to take up his own residence in a place where his wife cannot go, and then tell her to maintain herself. Allowance given wife of 1-3 of rental of husband's farm, payable quarterly.

Action for alimony, tried at Kingston on the 28th February.

J. A. Hutcheson, K.C., for the plaintiff.

J. L. Whiting, K.C., for the defendant.

HON. MR. JUSTICE MIDDLETON:—The plaintiff and defendant were married on the 28th October, 1907. The plaintiff is 36 years of age and her husband forty-eight. There is no issue of the marriage. The husband owned a farm worth \$3,500, unincumbered, and the usual stock and cattle.

In the spring of 1909, the defendant was attacked by paralysis. He became, and still remains, utterly unable to work. His condition is said to be slightly improving, but it is as yet uncertain whether he will ever be able to do anything.

The plaintiff did her best to face the situation in which she found herself with her invalid husband, but in the fall of 1909, she realized that it was impossible to continue farming, as she had not the physical strength and could not afford help. Some of the farm chattels had been sold in the meantime, and she made up her mind that the best thing was to sell the remaining stock, etc., and move to the village of Gananoque, where she would rent a house and take in boarders. In this way she hoped to be able, with the assistance of the rent of the farm, to maintain herself and her husband. The husband's condition at this time prevented him from taking any active part, but he appears to have concurred in all that his wife was doing.

A house was rented in the village, the farm was rented, and when the time for moving came the furniture was taken to Ganonoque. The husband desired to remain for a few days with his father, mother, and sister, who lived on an adjoining farm; and the wife left him, understanding that he would follow her in a few days. He did not come, and she has made various attempts to induce him to move to the village, but he prefers to stay where he is. It is said that he is induced to adopt this course by his relatives and that in his enfeebled condition he has become subject to their domination. On his behalf it is said by his counsel that he prefers to stay upon a farm, that he has been brought up and lived all his life upon a farm, and that he does not think his chance for recovery would be as good if compelled to live in the village.

There is no evidence to indicate that the husband and wife cannot live happily together. It does appear that the wife and her sister-in-law cannot agree. It is entirely out of the question for the wife to live with her husband where he now is.

At the trial I went out of my way to try and bring about a settlement; but neither party would give way, and each asserted his or her right; so that I am compelled to deal with the problem, thus presented, in accordance with the strict rights of the parties, trusting that in the end good sense may prevent what I feel would be a disastrous result.

At the time of the removal to Gananoque all outstanding liabilities were paid, and the wife then found herself in possession of \$376, which included \$90 rent of the farm for the first year. She used a portion of this \$376 in furnishing the house; and she has from time to time encroached upon what remained, so that now this fund is entirely exhausted. She has been keeping four boarders, and has not been able to make sufficient to maintain herself without resorting to the capital fund. The husband has received the second year's rent of the farm, \$140, and apart from this he has been maintained by the charity of his relatives.

When asked her plans for the future, the plaintiff said that she desired to have her husband live with her in the village. This would necessitate getting rid of two of the boarders. She thinks that with the rental of the farm and the profit from the two remaining boarders she would be able to maintain her husband, who can do nothing for his own

maintenance. It is quite obvious that she is mistaken in this, and that the result will be that the farm will be sold or encumbered and will ultimately be lost. It seemed to me that she would have been wiser if she allowed her husband to be maintained by his father until it could be ascertained whether he would ever be able to take up farming again; but she is not ready to assent to this.

I think that the plaintiff has done nothing to disentitle her to her rights, and that she has a right to be maintained by her husband. I think his conduct amounts to a desertion and that he has no right to take up his own residence in a place where his wife cannot go, and then tell her to maintain herself.

I have not been referred to any case at all like this in its circumstances, and I have not been able to find any. The general rule is that the wife is entitled to one-third of the income of the husband. His income will, of course, include his earnings. If the wife has an independent income, then this is to be taken into account in making her allowance; but I can find nothing to warrant the statement that the wife's share of the income is to be cut down by reason of her own earning capacity. Nor can I find anything that indicates that where the husband is by illness incapacitated from earning, the wife is entitled to resort to the corpus of his estate for her maintenance. I, therefore, conclude that the most I can give the wife under the circumstances is one-third of the rental of the farm, say \$50 per annum. This should be paid to her quarterly. I do not think that any allowance should be made for arrears, because since the separation she has received and spent \$376, while her husband has only received \$140.

The wife is also entitled to her costs; but I am told that the litigation has been conducted very inexpensively, and I feel sure that the plaintiff's solicitor will not feel himself aggrieved when I fix the costs at \$75—a sum which is quite inadequate as indicating the value of his services rendered, but which will, I fear, bear all too heavily upon the unfortunate defendant.

I do not desire that there should be any proceeding taken which would bring about a sale of the farm. That at the present time would be disastrous to both parties. I will therefore listen favourably to any application for a temporary stay of execution for these costs if payment cannot be

arranged between the parties. It goes without saying that this allowance to the wife must be regarded in the nature of a temporary arrangement only, and that if the husband recovers and does not then make adequate provision for his wife, she will be at liberty to apply to a Judge in Chambers for an increased allowance. At present there is nothing to indicate that if the husband is fortunately restored to health he will not make a home for his wife.

DIVISIONAL COURT.

MARCH 2ND, 1912.

McMULKIN v. TRADERS BANK OF CANADA.

3 O. W. N. 787; O. L. R.

Execution—Banking—Attachment of Money Deposited in Bank—Head Office in Ontario—Deposit in Calgary—Notice Forwarded Manager at Calgary—Money Subsequently allowed to be Withdrawn—Liability of Bank to Garnishee—Con. Rules 162, 911 et seq.

Judgment debtor resident in Ontario, had \$3,415, on deposit in Calgary, Alta., in a branch of a bank having its head office in Ontario. Judgment creditor served garnishee process upon the head office, attaching the money to satisfy his judgment for \$211.33, notice of which was forwarded the manager at Calgary. Subsequently he allowed the money to be withdrawn.

DIVISIONAL COURT *held* that the bank was liable to pay the amount of the judgment debt and costs, holding that the debtor could have sued in Ontario to recover the debt due him by the garnishee, therefore the parties were properly before the Court and it had jurisdiction over the matter.

Rex v. Lovitt, [1912] A. C. 212, specially referred to.

An appeal from a judgment of HIS HONOUR JUDGE FINKLE, of Oxford County Court, upon the trial of a garnishee issue.

The appeal to Divisional Court was heard by HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B., HON. MR. JUSTICE TEETZEL, and HON. MR. JUSTICE MIDDLETON.

J. B. Clarke, K.C., for the judgment creditor, appellant.

R. McKay, K.C., for the Traders Bank of Canada, garnishees, respondents.

HON. MR. JUSTICE MIDDLETON:—The facts are not in dispute. On the 8th August, 1911, the judgment creditor recovered a judgment for \$211.33. On the 17th August, 1911, a garnishee order nisi was obtained, attaching any debt due from the Traders Bank to the judgment debtor. This order was served on the manager of the Traders Bank at Ingersoll, on the 17th of August, and upon the head office at Toronto, on the 18th of August.

An issue was directed between the attaching creditor and the garnishee for the purpose of determining whether at the time of the service of the said order there was any amount owing from the Traders Bank to the judgment debtor and whether the garnishee order "was a valid attachment of such debt."

At the trial the learned Judge found against the attaching creditor, no reasons being assigned.

It appeared that at the time of the recovery of judgment the judgment debtor had \$3,415 upon deposit in the branch of the Traders Bank at Ingersoll. This sum was withdrawn and on the 9th August was deposited with the branch of the bank at Calgary. When the attaching order was served it was accompanied by a notice addressed to the bank, warning it that the money sought to be attached was upon deposit with the Calgary branch. The general manager forwarded the attaching order to Calgary. It reached the Calgary office before banking hours on the 24th. Notwithstanding this, the bank permitted the withdrawal of the whole \$3,415, and it was upon the same day re-deposited by the judgment debtor to his own credit "in trust;" and later on in the same day the money so deposited was again withdrawn.

There is no doubt that at the time of the service of the garnishee order the garnishees were indebted to the judgment debtor. The only question is whether this indebtedness was subject to attachment at the instance of the judgment creditor in the Ontario Courts. This fails to be determined on the Rules 911 et seq. These Rules were validated by 58 Vict. ch. 13, sec. 42, and 59 Vict. ch. 18, sec. 15. No notice has been served as required by sec. 60 of the Judicature Act, if it is intended to contend that this legislation is ultra vires of Ontario.

By the rules in question it is plain that the intention was to make exigible to answer a judgment recovered in Ontario: (a) any indebtedness to the judgment debtor where the gar-

nishee was within Ontario, or (b) where the garnishee was not not within Ontario; but the case would fall within the provisions of C. R. 162, if the judgment debtor was himself seeking to assert his rights within Ontario. The Rule does not proceed upon any theory as to the situs of the cause of action to be taken in execution, but proceeds upon the theory that the creditor has a right to be subrogated to the position of his debtor, and to assert, for the purpose of enabling him to obtain satisfaction of the judgment, any right which the debtor himself could assert. If the garnishee is within Ontario, and can be served within Ontario, the judgment creditor is given the right to collect any debt due by him to the judgment debtor. If the garnishee is not within Ontario and cannot be served within Ontario, then a debt cannot be collected under this process unless it falls within the classes enumerated in Rule 162.

This narrows the question for determination to an enquiry whether the debtor could himself sue in Ontario to recover the debt due him by the garnishee.

Before the decision of the Privy Council in *Rex v. Lovitt*, [1912] A. C. 212, no one would have doubted this right. The question in that case was not one between the bank and its customer. What was there discussed was the right of New Brunswick to claim succession duty with respect to moneys on deposit in the St. John branch of the Bank of British North America. The head office of the bank was in London, England; the domicile of the testator was Nova Scotia. The right of the province to tax was said to be limited to assets within the province. It was argued that the situs of this simple contract debt was either at the residence of the debtor—i.e., where its head office was, in London, England—or the domicile of the creditor, i.e., Nova Scotia. The province claimed that the debt was a debt payable at St. John, and that it was primarily recoverable at St. John: the contract, properly understood, being a contract to be implemented at the branch of the bank in St. John. The Privy Council agreed with this, and thought that the locality of the debt was in truth fixed by the agreement between the parties and that branch banks, although agencies of the bank itself, for certain purposes, may be regarded as distinct trading bodies.

Had our Rules been based upon the locality of the debt to be taken in execution, this judgment would be conclusive against the attaching creditor; but if I am right in think-

ing that this is not the test, then the decision has no application. The sole test given by our Rules is the ability to serve within Ontario or the ability to bring the case within Rule 162, if service cannot be made within Ontario. Had the contract been made between two residents of Calgary, and had the promise been to pay at Calgary and nowhere else, so that the parties had given as definite and complete a locality to the debt as is possible in the case of simple contract debts, and had the debtor thereafter moved within Ontario, then the debt would none the less be liable to attachment under our Rule, which merely requires the existence of a debt and presence of the debtor within Ontario. The debtor would not be exempt from suit at the instance of his original creditor if found and served within Ontario, because the Courts of Ontario have universal jurisdiction in all personal actions, subject only to their ability to effect service within their own jurisdiction. *Tytle v. Canadian Pacific Rw. Co.*, 29 O. R. 654.

Upon the argument much was made of the difficulty that might in some cases arise if the Courts of Ontario were to assume authority to take in execution a debt of this kind, because, it was suggested, foreign Courts might not accord to the judgment of the Ontario Court any extra-territorial recognition. It is a sufficient answer to this to point out that this is a question of policy, affecting those who make the law, and that it cannot be considered by the Courts, who are called upon to administer the law as they find it. *Western v. Perez*, [1891] 1 Q. B. 304.

But it is not likely that in this case any such question can arise, because at the time of the original suit the judgment debtor was resident within Ontario, and he appears to be still here, as he was served with a notice of this appeal at Ingersoll.

The appeal should be allowed, and the garnishee should be directed to pay to the judgment creditor sufficient to satisfy the judgment debt and the costs of the attachment proceedings of the issue and of this appeal.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B., and
HON. MR. JUSTICE TEETZEL:—We agree.

DIVISIONAL COURT.

MARCH 4TH, 1912.

FREMONT v. FREMONT.

3 O. W. N. 789; O. L. R.

Husband and Wife—Alimony—Separation Agreement—Not Bar to Alimony.

DIVISIONAL COURT, *held*, that a separation agreement not providing for maintenance of wife is not a bar to wife's right to alimony, without special provision therein that it shall.

An appeal from a judgment of HON. MR. JUSTICE CLUTE at the trial, 13th December, 1911, awarding the plaintiff alimony.

The appeal to Divisional Court was heard by HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B., HON. MR. JUSTICE TRETZEL, and HON. MR. JUSTICE MIDDLETON.

G. H. Watson, K.C., for the defendant.

R. McKay, K.C. for the plaintiff.

HON. MR. JUSTICE MIDDLETON:—The marriage took place on the 16th May, 1904. The plaintiffs co-habited until the 16th November, 1906, upon which day a separation agreement was entered into. Since then the wife has been maintaining herself and her two children.

The trial Judge has found, upon conflicting evidence, that the plaintiff was justified in leaving her husband by reason of his cruelty and misconduct. The sole question argued before us was as to whether the provisions of the separation deed preclude the action.

By the terms of this deed the parties agree to live separate from each other, and each agrees not to take any proceedings against the other for restitution of conjugal rights or to annoy or interfere with the other in any manner whatsoever. The husband agrees to pay the wife \$250, \$50 in cash and the balance secured by 40 promissory notes of \$5 each, payable monthly. The wife agrees to pay her own debts, save three named accounts, and to support the two children.

It is to be observed that there is no provision in this deed relating to the maintenance of the wife. She does not

covenant not to claim alimony from her husband, nor does she covenant to maintain herself. The learned trial Judge has taken the view that the mere agreement to live separately does not relieve the husband from his obligation to support and maintain his wife. With this we agree.

A husband, by the act of marriage, undertakes to maintain and keep his wife, unless she commits adultery; and when she is living apart from him under circumstances which justify the separation he is bound to maintain her unless she has expressly renounced her rights or she has such means of her own as make it unnecessary for him to maintain her. If the husband fails to maintain her, she has what has been called "authority of necessity" to pledge her husband's credit. Mr. Watson is probably right when he takes the position that the same test can be applied to determine the wife's right to alimony as in the case of an action brought against the husband by one who has supplied his wife with necessities; the creditor in the latter case deriving his claim entirely from the wife's implied authority.

The earlier cases made the adequacy of the provision of the husband for his wife's maintenance the test of the limit of her authority. The later cases have departed from this rule; and unless the wife is entitled to relief by reason of fraud or duress she is now regarded as able to make her own terms and to agree to accept a stipulated allowance as being adequate for her maintenance.

In this case there is no provision whatever for maintenance, and there has been no release by the wife of her right to be maintained. The wife is entitled to be separately maintained, not merely because the husband has agreed to her living apart, but because the misconduct found by the Judge justifies a separation.

The case falls within the words of Lush, J., in *Eastland v. Burchell*, 3 Q. B. D., at 435: "If he wrongfully compels her to leave his home he is bound to maintain her elsewhere; and if he makes no adequate provision for this purpose she becomes an agent of necessity to supply her wants upon his credit. In such a case, inasmuch as she is entitled to a provision suitable to her husband's means and position, the sufficiency of any allowance which he makes under these circumstances, is necessarily a question for the jury. Where, however, the parties separate by mutual consent, they may

make their own terms; and so long as they continue the separation, these terms are binding on both."

Here the parties have not made their own terms for the separate maintenance of the wife. The husband has made no adequate provision for her, and she is justified in resorting to the Court for an alimentary allowance.

This case differs from any reported decision; as in all the reported cases where there was separation, either voluntary or on account of the husband's misconduct, the separation did contain an alimentary provision. It is impossible to regard the lump sum of \$250 as being intended for the maintenance of the wife. The deed does not so stipulate; and, apart from the fact that that sum is clearly inadequate for this purpose, it may have been a payment made to induce the wife to assume care of the children. In *Atwood v. Atwood*, 15 P. R. 425, and 16 P. R. 50, the Chancellor says:—

"A separation deed may be well upheld by the payment of a sum in gross, and a provision to arise *de anno in annum* is not essential."

No authority is referred to, and I can find no case in which such a provision was made. A lump sum so paid, enough to produce an adequate income or to supplement the wife's own income, might well be sufficient; but a sum such as that paid here would be so grossly inadequate as to afford in itself conclusive evidence either of duress or improvidence.

In this case it is sufficient to say that upon the deed itself the sum is not accepted in lieu of alimony.

The appeal should be dismissed with costs.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B., and
HON. MR. JUSTICE TEETZEL:—We agree.

HON. MR. JUSTICE KELLY.

MARCH 4TH, 1912.

THOMSON v. MCPHERSON.

3 O. W. N. 791.

Mining Contract—Sale of Interest in Mining Company—Abandonment—Rescission—Registration of Caution against Company's Claim.

KELLY, J., dismissed with costs plaintiff's action for specific performance of an agreement to sell an interest in the Mac Mining Co., or in the alternative for damages in the sum of \$14,666.66 and interest from the due dates mentioned in the agreement holding that the agreement was indefinite and incomplete, the interest and sale price not being ascertained.

Tried at the Toronto non-jury sittings, January 19th, 1912.

R. C. H. Cassels and J. F. Lash, for the plaintiff.

S. H. Bradford, K.C., and A. D. Crooks, for the defendant McPherson.

W. N. Tilley and G. W. Mason, for the defendant Lobb.

HON. MR. JUSTICE KELLY:—The Mac Mining Company was incorporated with a capital of \$350,000 divided into 35,000 shares of \$10 each. 30,000 of these shares were directed to be issued; the remaining 5,000 are unissued.

On or prior to December 28th, 1905, 18,000 shares were acquired by George Chapman and Frank Frank. On 15th March, 1906, the following assignment was made by Chapman and Frank:—

“Mr. George Chapman and Mr. Frank Frank hereby assign all their right, title and interest in the Mac Mining Company Ltd., of Toronto, to Dr. D. A. McPherson for \$15,000, payable \$1,000 in cash, \$1,500 on 15th March, 1906, \$12,500 on 15th April, 1906. If the said \$12,500 is not paid on said date, the payments of \$1,000 and \$1,500 are to be forfeited, and time is to be the essence of this agreement.

(Sgd.) George Chapman,

(Sgd.) Frank Frank.”

Then the following assignment was made by defendant McPherson:—

“In consideration of \$1,000 to be paid to me on or before the 1st October, 1906, I assign, transfer and set over unto Arthur Thomson and Arthur F. Lobb, all my right, title and interest in an assignment from George Chapman and Frank Frank to me of their interest in the Mac Mining Co., dated 15th March, 1906, subject to the terms thereof.

Dated 17th March, 1906. (Sgd.) D. A. McPherson.

Witness: Rhoda B. Hall.”

(Seal.)

Arthur Thomson is the brother of plaintiff, and whatever he did in this whole matter was done as plaintiff's agent and representative. Plaintiff and defendant Lobb each contributed \$7,500 to make up the \$15,000 paid to Chapman and Frank; the \$1,000 mentioned in the latter assignment has not yet been paid.

The interest which these parties purchased was not then, and down to the time of the trial was not, defined.

Defendant Lobb's attention was first drawn to the project by Arthur Thomson, who then, by arrangement with Lobb, went to defendant McPherson to get particulars. After his interview with McPherson he returned to Lobb and left with him a memorandum shewing the interest of Chapman and Frank, which would go to the purchasers, to be 13,500 shares; the books of the company, however, shew that 18,000 shares belonged to Chapman and Frank, and this is the amount defendant Lobb claims that he and plaintiff were entitled to under McPherson's assignment of March 17th, 1906.

In the negotiations, however, defendant McPherson did not make it clear what amount the purchasers would get, nor does he seem to have been himself certain of the amount. While the memorandum left by Arthur Thomson with Lobb indicated 13,500 shares, McPherson at another stage of the negotiations mentioned 12,500 shares, and then executed the assignment of March 17th, 1906; and when Lobb claimed the 18,000 shares shewn by the company's books, McPherson denied the purchasers' right to this number on the ground, as he claimed, that Chapman and Frank had not paid all they agreed to pay for the shares, and were, therefore, not entitled to, and could not sell, the full 18,000 shares. Something was said, too, by McPherson of his being entitled to receive and retain a portion of these shares as a commission. Defendant Lobb's account of it is that when plaintiff (or his representative) and defendants could not, and did not, agree on what number of shares or what interest, was to pass to plaintiff and Lobb, under the assignment of 17th March, 1906, and as there was no immediate prospect of profit or advantage from the mine or the mining claim, it was decided to leave the determination of the amount in abeyance until the time arrived when something "was in sight" or could be realized from it. This I accept as the fact; and it is corroborated by the evidence of Arthur Thomson, to which I refer later on.

On September 25th, 1909, the following document was signed by plaintiff and defendant: "Toronto, September 25th, 1909, "To D. A. McPherson and A. F. Lobb, buyers:—

"I agree to sell my interest in the Mac Mining Company upon a basis of eighty thousand dollars (\$80,000) for the claim less an amount not to exceed (\$6,500) sixty-five hundred dollars for charges against the eighty thousand

(\$80,000) dollars. Terms: one quarter cash in fifteen days from date, one-eighth in thirty days thereafter, one-eighth in sixty days thereafter, and one-eighth in ninety days thereafter; the balance to be paid in two payments, one in six months thereafter and one in nine months thereafter (after said fifteen days). The shares to be delivered as paid for or secured, or buyers to give promissory notes for payments at said dates, stock to be delivered on delivery of notes at the option of the buyers.

(Sgd.) R. S. Thompson.

Accepted, (Sgd.) D. A. McPherson,
one-half each. (Sgd.) A. F. Lobb."

This action is brought for specific performance of this agreement, or in the alternative for damages in the sum of \$14,666.66 and interest from the due dates mentioned in the agreement.

At the trial an application was made by the plaintiff to amend the statement of claim by adding a claim for payment of \$14,666.66 and interest, which amendment I allowed.

The company's sole asset was a mining claim—part of broken lot No. 8, in the 4th concession of the township of Coleman.

On October 5th, 1909, a caution was registered by one Milne against the claim, alleging, amongst other things, ownership of an interest therein. All parties conceded that this registration had a very detrimental effect on the value of the property.

The defendants have set up that the agreement sued on is indefinite and incomplete and cannot be enforced. I agree with that contention. In *House v. Brown*, a decision of the Divisional Court, reported in 14 O. L. R. 500, Mr. Justice Anglin, at p. 525, says "That the want of a definite provision in a contract fixing the amounts and dates of payment of deferred instalments of purchase-money renders a contract incomplete and unenforceable where it is contemplated that these matters shall be the subject of further negotiations and future settlement between the parties thereunder is well established."

It is well settled law that to render a contract for sale complete there must be a price ascertained or ascertainable. *Logan v. Mesurier* (1847), 6 Moo. P. C. 116 (at p. 132).

The price payable to the plaintiff was not and is not yet ascertained.

That was to be determined in further negotiations between the parties. From the 23rd September, 1909, until April, 1910, plaintiff did not meet or have any communication of any kind with defendants. Arthur Thomson, however, during that time did see defendants when the question of coming to an agreement settling upon the number of shares, or the interest, which plaintiff and Lobb should receive came up. Arthur's evidence thus refers to what happened after October 5th, 1909:—

“Q. Then you arranged a meeting with Dr. McPherson?

A. And I was endeavouring all that time to arrange a meeting with Dr. McPherson and have this matter of disposition of interest cleared up.

Q. Why didn't you tell me? A. I began to tell you, you interrupted me.

Q. You say the first time you went there Mr. Lobb asked you to arrange an appointment with Dr. McPherson? A. I did not say that—not to my knowledge.

Q. What do you say now? A. I say now Mr. Lobb told me he was too busy.

Q. Will I put it this way—that this disposition of shares had not been arranged yet with Dr. McPherson, that that had to be done?—how many shares your brother was entitled to?

A. Yes, because there was a dispute whether he should get a quarter interest or something more, and Mr. Lobb was inclined to think it should be something more—the thing just held that way, so that it might be arranged so that he would get more, do you see.

Q. Yes? A. And I tried for fully six weeks to get a meeting between Mr. Lobb and Dr. McPherson to get this thing cleaned up, and I could never get them together.

Q. What time did those six weeks cover—before Christmas? A. I fancy it was in January—it was in January I really called on Dr. McPherson. I recollect walking to his office on a cold day to see if he was going to move to have this thing arranged.

Q. So at that time you were trying to straighten out this question of shares? A. That is what Mr. Lobb claimed.

Q. That is what you were doing? A. I was trying to get the men together so they could straighten them up.

Q. You were referring this to your brother from time to time? A. I did not report much.

Q. Why not? A. Not every time I met him. I told my brother I was trying to get the thing arranged.

Q. Did you tell him what you were doing? A. Yes.

Q. You were trying to bring them together? A. Yes.

Q. Did you tell him you were trying to get it straightened out, how many shares he was entitled to? A. Yes, I told him I thought he might get more shares.

Q. And that was going on in January and February?

A. That was going on in December and January.

Q. That was after you knew about the caution? A. Yes, I know about the caution at that time.

Q. So here you were—you knew about the caution on the property, and you say that all these efforts were being made to straighten out the question of shares—is that right? A. Yes."

This of itself, apart from the other facts, shews that an unsuccessful attempt was made, after the signing of the document of 25th September, 1909, to open up negotiations to determine these interests, that the interest of the parties had not been determined, and that an essential element of a completed contract was wanting. There is the evidence, too, of plaintiff on cross-examination that he never offered to deliver any shares to the purchasers and was not in a position to do so.

Moreover, even if the number of shares receivable by these parties had been determined there was still to be ascertained the amount to be deducted from the \$80,000 for charges. The document sued upon says this was not to exceed \$6,500, but it is not otherwise fixed, and for this reason also the amount to which plaintiff was entitled could not be definitely arrived at.

It seems reasonable to conclude, too, that if at the time the agreement for sale by plaintiff was under consideration it had been clear and certain what number of shares, or what interest, plaintiff was entitled to, this agreement would have stated the exact price he was to receive, instead of making use of the more roundabout and more cumbersome method of stating a selling value of the whole claim as a basis of calculating the value of plaintiff's interest.

For these reasons I think the plaintiff's action fails.

Defendants also set up that the property owned by the Mac Mining Company was really the subject of the sale by plaintiff, and that the filing of the caution by Milne in

effect operated as a destruction of the subject-matter of the contract, and, further, that from the filing of the caution all parties treated the contract as rescinded. Even if the agreement had been complete, I would feel bound to conclude that under the circumstances of what followed the filing of the caution, it was rescinded. In *MacBryde v. Weekes*, 22 Beav. 533, Sir John Romilly, at p. 539, says: "This, in my opinion, is one of those cases in which time was, from the nature of the property, necessarily of the essence of the contract, in this sense and to this extent that it was incumbent on the owner to use his utmost diligence to complete his part of the contract, and that if he failed in so exerting himself, the defendant might decline having anything further to do with the matter," and this he states to be the owner's duty, although no time is specified in the contract.

This was a case in which the subject of the contract was in part a lease for working a mine, which Lord Romilly says "is a trade of fluctuating character," and the rest of the property contracted for was not merely for the same purpose, but was leasehold having a short period to run.

The subject of the contract now under consideration was certainly of a fluctuating character, and the words of Lord Romilly are applicable to it.

In *Morgan v. Bain*, L. R. 10 C. P. 15, Lord Coleridge says, "It is clear that the omission to perform certain acts incumbent upon the party to a contract may justify the other party in coming to the conclusion that, in point of fact, the party guilty of the omission intends to abandon the contract, and is himself treating it as abandoned, and rescinding it."

Here the plaintiff, from the filing of the caution on October 5th, 1909, until April, 1910, did not see defendants or personally do anything in recognition of the agreement, and though his brother, who represented him, says he communicated by telephone with defendant Lobb a number of times in the latter part of 1909, asking for payment, Lobb's evidence is to the effect that these communications had reference to the settling of what shares or interest plaintiff was entitled to. This latter is, I think, the more probable view, having in mind the evidence of Arthur Thomson quoted above.

Both plaintiff and Lobb knew the disastrous effect of the filing of the caution, and that it was useless to endeavour to

sell while the caution remained undischarged. A remarkable circumstance is that, though from the time the caution was filed until plaintiff met Lobb in April, 1910, Arthur saw the plaintiff weekly or oftener, and at times stopped in the same house with him, he did not tell him of the caution. Arthur knew of it soon after it was filed. It is difficult to find an explanation of such indifference to a matter of so serious import, and in a transaction of a nature requiring prompt attention and the utmost diligence, unless on the assumption that plaintiff, realizing the disastrous effect of the caution, considered, and treated, the whole matter of the sale as at an end. It is quite clear that defendant Lobb, and, I think, defendant McPherson also, so treated it, and I think they were justified in coming to the conclusion that plaintiff looked upon it as abandoned or rescinded. Defendants would have the right to rescind if the plaintiff had rescinded, or if the plaintiff, having so behaved himself as to give them reasonable ground to conclude that he had abandoned the contract, they did so conclude (*Morgan v. Bain*). I think plaintiff and his representative did so behave, and that defendants concluded he had abandoned.

The plaintiff's claim is dismissed with costs.

HON. SIR G. FALCONBRIDGE, C.J.K.B. MARCH 6TH, 1912.

McCONNELL v. VANDERHOOF.

3 O.W.N. 800.

Contract—Breach—Advertising Agents—Damages—Costs.

Action by advertising agents carrying on business at London, against manufacturers of druggists' special preparations, to recover damages for breach of contract in respect to certain advertising and for moneys expended.

FALCONBRIDGE, C.J.K.B., refused defendants' application to plead the Statute of Frauds. Judgment entered for plaintiff for \$250 plus amount paid into Court with costs.

Sir Geo. Gibbons, K.C., and G. S. Gibbons, for the plaintiffs.

W. J. Elliott, for the defendants.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—
Plaintiffs are advertising agents. Defendants are manufacturers of "Standard Pharmaceutical Preparations," which is translated by a witness as meaning patent medicines.

Plaintiffs claim that their "client" gets the advantage of their expert knowledge, and that it does not cost him, the "client" any more—the newspapers paying the agent a commission averaging 20%.

Plaintiffs and defendants had had some business relations for about two years before August, 1910, but defendants had been doing much or all of their advertising through a rival firm (A. McKim Ltd.), and the following contract was entered into dated 8th or 9th August:—

The plaintiff McConnell swears this contract was to run for a year, and I find this to be a fact, but he did not take the trouble to make this part of the written contract, which the plaintiffs must abide by.

E. S. Vanderhoof swears that the agreement was that the "ads," as they call them, were to be given the same positions or of the same class as with McKim. Defendants in turn must abide by the writing, which says as good positions as are now being given.

The ostensible ground of complaint put forward by the defendants is that they preferred their advertisements to appear as reading matter, whereas plaintiffs inserted them among the reading matter with display headings. The reading matter costs more, but the plaintiffs had no interest in this. They got their commission, less the 5% which they were to allow defendants.

If it is at all material, there is no evidence to shew me which form of advertisement is more likely to attract purchasers or customers, nor were any copies of newspapers produced in illustration.

Personally, I should rather buy from the man who frankly heads his advertisement with the display than from the one who under false pretences induces the unwary to peruse half a column of more or less interesting matter and to come suddenly on an announcement of the merits of a patent medicine. Against this person one feels a certain amount of resentment.

I find therefore that defendants had no real grievance, but that, coming into touch again with the McKim Company (whose agent, saying their interests were identical, promised that McKim would see that defendants "got through the suit"—"would see them through") unreasonably assumed to cancel this contract.

Plaintiffs contend alternatively that the contract is to last as long as defendants had any advertising to do. I do

not so hold, but I think that defendants ought to have presented their alleged grounds of complaint and asked that they be remedied, and in default of such remedy, after a reasonable time, proceeded to cancel.

As to damages, plaintiffs claim the commission which they would have earned on the year's business. This I do not allow. All the arrangements are very loose. No newspaper has held or tried to hold plaintiffs on their alleged contracts for the year.

But plaintiffs ought to get a reasonable allowance for their personal trouble and expert knowledge in making the initial contracts with the newspapers—and otherwise in getting matters going. The year's work would have gone through automatically through the medium of the clerical staff in their office.

I am awarding them a modest sum when I give them \$250 for this. The judgment will be for this sum, plus the amount paid into Court—with costs all through on the High Court scale. Thirty days' stay.

I refuse defendants' application to plead the Statute of Frauds. I do not think it would help them.

HON. MR. JUSTICE SUTHERLAND.

MARCH 6TH, 1912.

CAMERON v. HULL.

3 O. W. N. 807.

Vendor and Purchaser—Will—Doubtful Questions of Construction—Possible Claimants under Order for Representation of—Refusal to Construe.

Application by vendors, for an order declaring that the objection to the title of the vendors to the lands in question made by the purchaser on the ground that Mary Jane Henderson took an estate in fee simple and not merely a life estate in the lands under the will of Andrew Henderson, Jr.

SUTHERLAND, J., *held*, that the application should be dismissed with costs, leaving the vendor to seek such other remedy, if any, as he might be advised in the matter, as on an application of this kind all the parties could not be brought in.

An application by the vendor under the Vendors and Purchasers Act. The agreement for the sale of the land in question dated November 8th, 1911, was admitted.

G. N. Weekes, for the vendor.

T. G. Meredith, K.C., for the purchaser.

HON. MR. JUSTICE SUTHERLAND:—On 2nd December, 1911, the purchaser's solicitors wrote to the vendor's solicitors as follows: "We are not at all satisfied that the fee in this land vested in Samuel J. Henderson under the will of his brother, Andrew, and will therefore require quit-claim deeds or sufficient releases by all the heirs and next of kin of Mary J. Henderson, the mother." The vendor initiated proceedings under said Act by notice of motion dated 31st January, 1912. The solicitor for the applicant filed in support of the motion the contract in question, a copy of the will of Andrew Henderson, and the said letter.

The motion first came on for hearing at the London Weekly Court on 3rd February. The purchaser had filed an affidavit in answer to the application in which he stated that being advised by his solicitor that it was doubtful whether or not the fee of the land passed to Samuel James Henderson under said will, he had notified the vendor that he would not complete the purchase. The affidavit further went on to say that on or about the 28th day of December 1911, the vendor called upon the purchaser and stated that he had another man who would take the property if he would not and suggested that the purchaser should give up the purchase and he would hand him back his \$200 deposit. That in reply to this proposition he had said he would consult his solicitor, and after doing so notified the vendor that he would not complete the purchase. The affidavit then goes on to say that the vendor and himself agreed that unless the purchaser heard from the vendor to the contrary within one week, the sale from him "would be off," and that he had heard nothing further from the vendor until these proceedings were commenced.

An affidavit of James Dunlop was also filed on behalf of the purchaser, stating that on the 28th December, 1911, he was present and heard the conversation between the vendor and the purchaser when the vendor suggested to the purchaser that he should give up the place and that he had another man who would take it; that thereupon the purchaser stated he could not give him a decided answer, that he would see his lawyer in the morning and would let Cameron know the next day at noon and give him a decided answer.

On these affidavits being read, counsel for the applicant asked an enlargement to examine the purchaser upon her

affidavit and an enlargement was made until the 10th February, 1912, and a further enlargement to the 17th February when the matter came on again before Hon. Mr. Justice Clute. After some further discussion of the matter an order was on that day made that the application be adjourned "to the weekly sittings in London on Saturday the 24th February, "and it appearing that the only persons interested in the estate of Mary Jane Henderson are Joseph Henderson, Samuel James Henderson, Matilda Smith and Agnes Coulter her natural and lawful children; Winnie Russell and Mamie Parsell the natural and lawful and only children of Eliza Jane Doyle, a deceased child of the said Mary Jane Henderson and William H. Gorman, T. A. Gorman, John Gorman, Jennie McPhee, Lillian Gorman and Agnes Manning, the natural and lawful and only children of Mary Diamond formerly Mary Gorman a deceased child of the said Mary Jane Henderson; E. Roy Stevenson and Jennie Bunston the natural and lawful, and only children of Sarah Stevenson a deceased child of the said Mary Jane Henderson and it appearing that the said Mary Jane Henderson left her surviving no other child and no other issue or descendant of any deceased child.

"It is further ordered that a copy of this order be served upon the said Matilda Smith, William H. Gorman and John Gorman and that they do represent in this proceeding the children and grandchildren respectively, and the heirs and next of kin of the said Mary Jane Henderson so that they, the said children and grandchildren and heirs and next of kin shall be bound by any order which may be made herein."

On the 24th February the matter came for final disposition when the applicant filed an affidavit proving that in the meantime a copy of the said order had been served upon said Matilda Smith, William H. Gorman and John Gorman respectively. None of these parties were represented upon the application.

Counsel for the plaintiff stated that he understood that the counsel for the defendant had abandoned any contention that the vendor had released the purchaser from the agreement. I did not understand that counsel for the purchaser acquiesced in this.

The clause in the will of Andrew Henderson which is in question reads as follows:—

"I give, devise and bequeath all my real and personal estate which I may die possessed of or interested in, in the manner following, that is to say:—I give to my mother, Mary Jane Henderson, and to my brother Samuel James Henderson jointly the share I have in the farm on which we live, to have and to use or to sell as they may choose, each to be entitled to the benefits of one-half of the product of my share in the farm and chattels—but it is hereby clearly understood and designed that my mother shall have no power to sell or convey any part or portion of the whole of what is hereby given to her by this will—but is only to have a share of the proceeds for her use during her life—and at my mother's death then the whole of my interest in this estate and whatever else I may die possessed of is to be given to my brother Samuel James Henderson, as above, to have and to hold as and for his own or to dispose of as he may wish."

While I am inclined to the opinion that under the said clause Mary Jane Henderson took merely a life estate in the lands in question, I am unable to say that a different opinion might not be fairly and reasonably come to by another.

In this case the purchaser had already been advised that it was doubtful that the clause of the will in question bears the construction contended for on the part of the applicant. I am not at all clear that parties can on an application of this kind be brought in in the way that the order already referred to assumes to bring them in.

Under these circumstances I am unable to come to the conclusion that the application should be granted. I think, therefore, it must be dismissed with costs leaving the vendor to seek such other remedy, if any, as he may be advised in the matter.

MASTER IN CHAMBERS.

MARCH 7TH, 1912.

BARKER v. SANDWICH, WINDSOR & AMHERST-
BURG R.W. CO.

3 O. W. N. 809.

*Trial—Postponement—Action for Damages for Personal Injuries —
Street Car Accident—Medical Examination of Plaintiff—Motion
Referred to Trial Judge.*

Motion by the defendants to postpone trial, for medical examination of plaintiff, and for further examination of plaintiff for discovery.

F. Aylesworth, for the motion.

F. McCarthy, for the plaintiff, contra.

CARTWRIGHT, K.C. MASTER:—The two first grounds have been satisfied by plaintiff and the third only remains.

It seems strange that a claim for injuries sustained almost a year ago was not enforced by action until February last and that no other person in either of the defendant company's cars has made a similar claim, though the plaintiff says in his examination (question 34) that his "car was crowded and people were standing up in it." However, the defendants admit liability as it was a collision between two of their own cars, and it is only a question of what damages, if any, the plaintiff is entitled to recover.

The medical examination can take place this week as the plaintiff agrees to facilitate it in every way. The defendants' medical officer, Dr. Ashbaugh, who saw the plaintiff after the accident, can confer with Dr. Dunwoody of Detroit and Dr. Bell of Windsor, who are now said by plaintiff to have attended him at and subsequent to the accident. This will probably enable the defendants to decide what sum they are ready to offer the plaintiff, and there does not seem any necessity at present to postpone the trial; most likely it would not come on for a week yet.

I thought at the argument that it might be right to direct a trial at Chatham on 9th April—but in view of the possible inability of plaintiff to get his witnesses there (as pointed out in *McDonald v. Dawson*, 8 O. L. R. 72). I think the motion should be referred to the trial Judge if a trial becomes necessary. He can then, if he sees fit, impose such terms as were approved of in *Scaman v. Perry*, 9 O. W. R. 537-761, and in other cases not reported. The main, if not the whole, evidence here will be that of three or four medical gentlemen. It would be a serious matter for the plaintiff in his financial position, earning only \$2.50 a day, to take them nearly 50 miles away from Windsor with a possibility of being kept there one or even two days or longer. As said in *McDonald's Case supra*, at p. 73: "The plaintiff's difficulty is to get to a distant place of trial."

HON. MR. JUSTICE BRITTON.

MARCH 8TH, 1912.

MUNN v. VIGEON.

3 O. W. N. 811.

Timber—Contract of Sale of Timber Limits and Assets of Company—Option or Offer—Construction—Reformation—"Not Completed"—Right of Vendor to Forfeit of Deposit Paid by Purchaser—Parties—Form of Action—Declaration—Costs.

Action for recovery of \$5,000 alleged to have been furnished by plaintiff to defendant Vigeon, who deposited it in the Imperial Bank, to secure an option for the purchase of certain timber limits and assets in defendant company. Plaintiff alleged that it was agreed that if the option was not exercised the money was to be returned to him.

BRITTON, J., *held*, that judgment should be entered for defendant Vigeon dismissing action as against him with costs, and that judgment should be entered for plaintiff against defendant company for \$5,000 with interest at 5 per cent. from November 28th, 1911, with costs. That there should be a declaration that the \$5,000 received by the Imperial Bank as the proceeds of plaintiff's cheque and interest thereon, if any, was the property of plaintiff. If that money or any part of it is paid to plaintiff, it will be in satisfaction *pro tanto* of plaintiff's judgment herein. If the defendant company pays and satisfies this judgment outside of and apart from the said money on deposit in the bank, then this money will belong to the defendant company.

Leighton McCarthy, K.C., for the plaintiff.

C. A. Moss, for the defendant Vigeon.

Jas. Bicknell, K.C. for defendants The Ontario Lumber Co., Ltd.

HON. MR. JUSTICE BRITTON:—This action is for the recovery of \$5,000, which sum the plaintiff alleges was furnished by him to the defendant Vigeon, and by the defendant Vigeon deposited for the purpose of securing an option for the purchase of certain timber limits and assets of the defendant company, and which sum was so given by the plaintiff upon the express understanding that if said option to purchase was not exercised by him, it was to be returned to him. The facts of the case, as I find them, are the following:—

The defendant company on the 5th July, 1911, in consideration of \$5,000 paid to them by Jas. Bicknell, K.C., gave to him an option for the period of 60 days from that date to purchase "all the assets consisting of limits, mills, dock, plant, etc., but not including the stock in trade in the store

at French River nor any lumber, lath or pickets piled or stored at the mill at French River or in the yard at Point Edward, or accounts receivable," for the sum of \$400,000 payable as follows:—

\$95,000 being the balance of first payment of \$100,000 on or before the expiration of 60 days, and the remainder or balance of \$300,000 on completion of transfer. The titles to be free from encumbrance, and the purchase to be completed at Mr. Bicknell's office on or before 15th September, 1911.

If the option were not exercised on or before 5th September, 1911, the same was to be void and the sum of \$5,000 paid to the company was to be the absolute property of the company.

If this option had been exercised by Mr. Bicknell acting for others, and the purchase made by him, it is very likely that the plaintiff and defendant Vigeon would have been interested in the purchase so made, but in what way or to what extent, if at all, does not appear, and is not material in the present action.

The persons behind Mr. Bicknell, and for whom he was acting, having made such inquiries and acquired such information about the property as they deemed necessary, did not desire that the purchase should be made, so the option lapsed.

The plaintiff, then acting for himself, although no doubt he intended to interest others in a purchase from the company, if a purchase could be made, employed the defendant Vigeon to act for him.

On the 14th September Vigeon wrote to the company, asking them to reconsider the price, with a view to resubmitting the option for the price of \$350,000, cash or part cash and satisfactory terms. On the same day the company replied, stating that they were not prepared to entertain a proposal at the price named. They stated that it would oblige them very much if the parties interested would let the company know their position and release their rights under the existing option, as they had other parties waiting the outcome of these negotiations and prepared to negotiate for a substantial increase on the amount mentioned in Mr. Bicknell's option. They add "We cannot emphasize too much that it will be useless for the interested parties to expect to negotiate on a reduced basis."

Notwithstanding this peremptory statement to Mr. Vigeon, which was communicated to the plaintiff, the plain-

tiff desired to get an option for a few days, but at the price of \$350,000. The plaintiff asked Mr. Vigeon to try to get this.

After some communication by telephone between the plaintiff and Vigeon, and between Vigeon and Lawrence, who was acting for the company, the plaintiff and Vigeon met on 5th October. They met Mr. Lawrence on that day.

I find that it was distinctly understood that day between these three persons, that Vigeon was to have the option for 10 days of purchasing at \$350,000, if he—Vigeon—would put up \$5,000, which sum, in the event of the option not being accepted, was to be returned. Mr. Lawrence drew up what was called the form. He said that was the only form the lumber company would sign. Vigeon, upon the understanding with Lawrence, acting for the company, that what he—Vigeon—was to sign was for an option, and was not a contract for purchase, signed at the request of the plaintiff and acting for the plaintiff.

I find that the plaintiff, when he authorized Vigeon to sign the paper, did so believing that it was for an option, and that Mr. Lawrence, in drawing up the paper, understood that plaintiff thought it for an option, and that in putting up \$5,000 he—Vigeon—was entitled to have that sum returned if the option was not exercised by Vigeon on plaintiff's behalf, or on behalf of whom it might concern.

The document was drawn by Mr. Lawrence at his own office, neither Vigeon nor the plaintiff being present. It is in form an offer to purchase, but in my opinion, it is not an unqualified offer—so that the sum of five thousand dollars, represented by plaintiff's cheque, can be applied as on account of purchase money—or be forfeited, if the purchase not carried out. The document compels the return of the \$5,000 if contract not completed. I must interpret these words "*not completed*," as if the words were "not carried out." The document now in question, and relied on by the company, makes very clear the distinction between the way of treating the \$5,000 paid under option to Bicknell, and the \$5,000 deposited by plaintiff.

The first \$5,000 had been forfeited and was to remain forfeited; but the \$5,000 put up by plaintiff, and now in question, was "to be returned, without interest, if contract not completed." If the completion of the contract was meant getting the company to accept the plaintiff's so called offer,

there was no reason for anything in regard to the return of that money.

If the meaning was that the plaintiff should go on and carry out a purchase under an already completed written contract, then if the plaintiff failed he would have no right to a return of this money; but if the company failed to make title, or if from any cause they failed to carry out their part of the contract through no fault on the part of plaintiff, then the plaintiff would be entitled as of right, to a return of the deposit. The return of the money mentioned in the writing does not refer to any such case. As I view this transaction, the money was put up to satisfy Mr. Lawrence that the defendant Vigeon was acting for a person or persons of substance—not men of straw. The return provided for, is a return in case the contract is not completed by an actual purchase by Vigeon or persons for whom he was acting, and sale by the defendant company—of the property mentioned upon the terms set out in full. Even if the document is not a mere option, it was at most an executory contract containing a term or proviso which should be interpreted to mean that if Vigeon or the plaintiff was not prepared on or before the 20th October, 1911, to proceed further he was at liberty to retire, and was entitled to the money he deposited. The deposit of the plaintiff's cheque for \$5,000 was made with the Imperial Bank of Canada to a special account. In the body of the cheque in plaintiff's writing, are the words "a/c option O. L. Co."

About the 19th October, Mr. Lawrence apparently made up his mind to attempt to force a sale upon Vigeon or the plaintiff, and so wrote to O. F. Rice, manager Imperial Bank at Toronto, advising that this money (\$5,000) was not to be paid out to anyone without the authority and consent of the Ontario Lumber Company.

Mr. Lawrence asserted that Mr. Vigeon was acting for Mr. Sheppard and Mr. Tudhope. Mr. Vigeon denied that he had ever told Mr. Lawrence that he—Vigeon—was acting in this matter for either Sheppard or Tudhope. Vigeon told Mr. Lawrence that he was acting only for the plaintiff.

On the 20th October, Mr. Lawrence had prepared the document called letter of authority (Ex. 8). This is signed and sealed by the company, and is addressed to Vigeon and to Lawrence authorizing them to insert the name or names of persons for whom Vigeon assumed to act as purchaser. I cannot think that the writing of this letter to Mr. Rice and

preparation of this authority were in accordance with the real transaction.

To me it appears as if these were written as preparing for a law-suit, not so much to compel a purchase, as to prevent the repayment of the \$5,000 to Vigeon or the plaintiff.

I may add that in my opinion the insertion in the so-called offer to Vigeon, of the clause in reference to the forfeit of \$5,000 paid under the Bicknell option, and which had then already been forfeited to the company was entirely unnecessary. Giving credit to Vigeon, or assuming to do so for this \$5,000, thus reducing the real price to \$345,000 was voluntary on the part of Mr. Lawrence. This was, I think, calculated to mislead the plaintiff and Vigeon.

If the writing in question does not bear the construction I have placed upon it—the plaintiff and Vigeon were, in my opinion, “in essential error” as to the import and effect of it. The plaintiff was induced to have it signed by Vigeon upon representations made by Lawrence acting for the company. The company seeks to get the advantage of what Mr. Lawrence did.

If the plaintiff is not by the terms of the writing itself entitled to a return of his \$5,000 there should be a reformation of these writings to make them conform to the real transaction between the parties.

As to the form of the action. I see no objection to the plaintiff suing in his own name. All the necessary parties are before the Court. The money deposited belonged to the plaintiff—was received by the defendant Vigeon from the plaintiff and deposited for the plaintiff with the Imperial Bank where the money still is on special deposit. The money should have been returned, but for the objection of the defendant company. The defendant company treats the action as if by Vigeon, acting as agent for the plaintiff.

The defendant Vigeon admits that the plaintiff is entitled to the money, and consents to its being paid to him. There is no cause of action shewn against Vigeon, so there will be judgment for him, dismissing the action as against him, and I see no reason for withholding costs.

There will be judgment for the plaintiff against the defendant company for \$5,000 with interest at 5 per cent. per annum from the 28th day of November, 1911, and with costs.

There will be a declaration that the \$5,000 received by the Imperial Bank of Canada as the proceeds of plaintiff's

cheque and interest thereon, if any, and now on deposit with that bank—is the property of the plaintiff. If that money or any part of it is paid to the plaintiff it will be pro tanto in satisfaction of plaintiff's judgment herein—if the defendant company pays and satisfies this judgment outside of and apart from the money in the bank on special deposit as above mentioned then that money will belong to the defendant company.

Thirty days' stay.

DIVISIONAL COURT.

MARCH 8TH, 1912.

DELYEA v. WHITE PINE LUMBER CO.

3 O. W. N. 823.

Negligence—Master and Servant—Workmen's Compensation Act—Lord Campbell's Act—Persons Entrusted with Superintendence—Parents' Damages—Expectation of Benefit from Son—Damages Assessed by Trial Judge without Jury—Reduction of on Appeal.

Administrator of the estate of one Delyea brought action under Workmen's Compensation Act and Lord Campbell's Act, to recover \$2,300 damages for the death of said Delyea, who was accidentally killed by a log falling on him, alleged to have been caused by the negligence of defendants.

CLUTE, J., gave plaintiff judgment for \$1,300 to be divided equally between deceased's father and mother, and costs.

DIVISIONAL COURT reduced the damages allowed to \$950. Appeal otherwise dismissed with costs.

An appeal by the defendants from a judgment of HON. MR. JUSTICE CLUTE, in favour of the plaintiff in an action tried at Sudbury, without a jury, on 22nd of November, 1911.

The action was brought by the administrator of the estate of Frederick Delyea, deceased, under the Workmen's Compensation Act and Lord Campbell's Act, to recover damages for Frederick Delyea's death. The deceased was a young man sixteen years of age, employed as a teamster at the defendants' lumber camp.

The appeal to Divisional Court was heard by HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B., HON. MR. JUSTICE BRITTON, and HON. MR. JUSTICE MIDDLETON.

R. McKay, K.C., for the defendants, appellants.

A. G. Browning, K.C., and J. W. Heffernan, for the plaintiff, respondent.

HON. MR. JUSTICE MIDDLETON:—The defendants desired to construct a machine called a log jammer. This machine consists of a heavy sled, to one side of which is attached a derrick consisting of two booms some 25 feet in length, united at the apex and separated about six feet at the base. The lower ends are attached by hinges to the edge of the sled, and the derrick is supported as raised by a gin pole hinged at about half height, resting upon the ground. The derrick is also, when in use, supported by guy ropes attached to the apex and fastened to trees or other convenient objects near by. A pulley is attached to the apex, and the machine is used for loading and unloading timber. When it is desired to move the machine the derrick is inclined over the sled and there supported by the gin pole which rests upon the opposite side of the sled.

Rumley, the camp blacksmith, was instructed by the defendants to construct the machine. He had no previous experience in constructing such a machine, but was directed to copy a similar one in use at the camp. There does not appear to have been any defect in his work. In completing the construction it was necessary to raise the derrick so that it would be supported by the gin pole. Rumley had the right to call upon men working at the camp to assist him in this operation; and when the machine was ready he called the deceased and others to help him. Upon the evidence it is clear that although the deceased might have objected to undertake this work, yet it was right and proper that he should respond when called upon by Rumley.

I think the learned trial Judge was quite right in holding that Rumley, quoad this job, was a person who had superintendence entrusted to him and also a person to whose orders or direction the deceased at the time of the injury was bound to conform. Once having acceded to Rumley's request, and having undertaken to assist him in raising the derrick, it became the duty of the deceased to obey Rumley's instructions. I do not think the fact of Rumley allowing the officious Fournier to assume the more prominent part relieved Rumley from the responsibility which was justly his.

The men engaged in lifting the free end of the derrick did so by stages. It was allowed to rest upon supports while they

changed their position so as to be able to lift more effectively. First a box was used, then a sleigh bunk, and finally the weight was supported by a piece of inch board in the hands of Fournier and a pole in the hands of the deceased. These were placed under the derrick, near its apex, and rested upon the frozen ground, snow and ice. As soon as the weight of the derrick was allowed to come upon these two supports, something slipped, and the derrick fell, striking Delyea upon the head and fatally injuring him. The exact cause of the slipping cannot be ascertained.

The board and pole were quite insufficient for their purpose; and it is clear that there was negligence in not providing better supports. When the derrick came to be lifted on the following day, pike poles were used, with proper spikes, so that there was no danger of slipping, and the derrick was raised without difficulty or danger.

At the time of the accident a guy rope was not attached to the top of the derrick; but the apex of the derrick had not then been lifted more than ten or twelve feet, and a guy rope would not at that stage of the work have afforded any protection.

The appeal is based mainly upon the two cases of *Garland v. Toronto*, 23 A. R. 238, and *Ferguson v. Galt*, 27 A. R. 480. These cases are well distinguished in *Shea v. Inglis*, 11 O. L. R. 124 and 12 O. L. R. 80, not cited upon the argument. There it was held that the superior servant had been in effect entrusted with the superintendence of the whole operation, and that the infant plaintiff was bound to conform to his orders; thus the case was brought within the statute. The Court of Appeal accepted the reasons for judgment as given in the Divisional Court by Mr. Justice Anglin, where, speaking of the cases relied upon, he says:—

“In the former case the injured man was on an equal plane with the workman who gave the direction. Neither the nature of the work in-hand nor any exigency arising in its performance required that the other workman should in that case direct the labour of the injured man. It was a case of pure assumption by a senior workman of authority which he clearly did not possess over his junior. In the latter case the direction to bring the mortar, given by the mason, was held not to be an order or direction within the meaning of the statute. It amounted to nothing more than an intimation by one workman to another that the

work of their common employer had reached a stage at which the latter was called upon to fulfil his own well-defined duty to such employer."

The cases of *McManus v. Hay*, 9 Rettie (4th series) 425, and *Brow v. Furnival*, 23 Rettie 492, affords no assistance. The holding in each case was that negligence had not been established. The fall of the article there being lifted was, upon the evidence, a mere accident and not the result of negligence.

I have more difficulty with the second branch of the appeal. The learned Judge has awarded thirteen hundred dollars damages. The deceased was earning thirty dollars a month and his board. His father and mother, on whose behalf the action is brought, are people in a humble walk of life; the father earning \$2 a day and his board. The age of these parents is not given; all that appears is that the deceased was the eldest of a family of six.

The amount awarded is almost equivalent to the capitalized value of one-half of the young man's earnings for the lifetime of his parents, assuming them to be fifty years of age. Having in mind the risks of life, the possibility of the marriage of the deceased, and endeavouring to apply the principles laid down in *Stephens v. Toronto Rv. Co.*, 11 O. L. R. 19, and *London & Western Trust Co. v. Grand Trunk Rv. Co.*, 22 O. L. R. 263; 17 O. W. R. 413, I think the damages should be reduced to \$950, subject to this, the appeal should be dismissed with costs.

I think we have the right to reduce the damages without directing a new trial, the case having been tried by a Judge and not by a jury.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B., and
HON. MR. JUSTICE BRITTON:—We agree.

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NO. 10

HON. SIR JOHN BOYD C.

MARCH 29TH, 1912.

RE ADAH MAY HUTCHINSON.

(AN INFANT.)

3 O. W. N. 933; O. L. R.

*Infant—Custody—Adoption—Rights of Parent against Grandparent—
Welfare of Child—Agreement under Seal—1 Geo. V. c. 35, s. 3—
Habeas Corpus.*

By an agreement the father granted and assigned all his rights to the possession, custody, control and care of his infant daughter, to her maternal grandparents. Father sought to regain possession of his child and on return of writ of *habeas corpus*

BOYD, C., *held*, that the evidence disclosed that the child could not be better placed than to be left with her grandparents, as they were well-to-do, living in a roomy house with a large lot, in which the child could play. That the character of the grandparents was beyond reproach and stood well in the opinion of the townsfolk. That the interests of the child would be better subserved by letting her custody remain in *statu quo*, the father having all reasonable access to his child when he so desired.

Ex p. Templer, 2 S. & C. 169, followed.

Re Davis, 13 O. W. R. 939; 18 O. L. R. 384, criticized.

Motion by the father of infant, William Hutchinson, on return of writ of *habeas corpus* for an order for the custody of his child.

By an agreement dated December 4th, 1911, the father granted and assigned to Robt. Burvill and Adah Burvill, maternal grandparents, all his rights to the possession, custody, control and care of the infant, etc., but now sought to set aside the said agreement. Some 42 residents of Tilsonburg petition against the child's removal.

W. N. Ferguson, for the father, W. H. Hutchinson.

V. A. Sinclair, for the grandparents.

HON. SIR JOHN BOYD, C.:—It is always unsatisfactory to deal with disputed facts as set forth in conflicting affidavits.

There is a mass of material before me which I have carefully perused and find that there is a cumulation of domestic details on which the various deponents contradict each other in an embarrassing manner. Disregarding the smaller discrepancies, I should judge, despite all the divergent opinions, that there is no danger likely to arise to the child whether she stays with her grandparents or goes to her father in regard to any tubercular infection. Nor do I think there is any lack of affection on the part of the father, though it may be he is not so attractive to the child as her grandparents. They have been to all intents *in loco parentis* to this young girl since her birth. The parents of the infant lived in the house and home of the maternal grandparents from the date of their marriage till the death of the wife on the 7th December, 1911, with a short interval from April to the middle of July, 1911, when the parents occupied another house. But during these few months the infant was left with the grandparents. The child was born in August, 1909, and is yet under three years of age—said to be an active, healthy child, yet easily excited and needing careful treatment.

I have no manner of doubt that the child cannot be better placed than to be left with the grandparents; they are well to do, living in a roomy house, with a large lot in which the child can play. The character of the grandparents is beyond reproach, and they stand particularly well in the opinion of the neighbours and townsfolk of Tilsonburg. They are devotedly attached to the child, as is the child to them, and they have really had everything to do with and for the child in its sleeping, clothing, maintenance, and personal supervision. The opinion I have formed on this head was shared in by the father himself in his conversation with Ernest Trethewey, and by Dr. Reid. It is also the opinion (for what it is worth) of Mr. and Mrs. Honsberger, who, having made affidavits to sustain the father's claim on the 20th March, explain away their statements in later affidavits made on the 25th March.

To hand over the child to the father would be in the nature of an experiment; he is a working man, aged about twenty-six, with no home at present; he proposes to establish one with the assistance of an elder sister, who has been for the last six or seven years working in a cutlery company's works at Niagara Falls, New York, and has had experience in looking after children. Owing to the scarcity of suitable

houses in Tilsonburg, it is not likely that the father can do more than get some rooms where the child will be in a sense cooped up with the street for a playground. The contrast between these prospects, even if the household machinery works smoothly, and the advantages possessed and now enjoyed by the child, is obvious.

No question of religion enters in to embitter the situation of the claimants; and I see no good reason why the father should not return to the household of the grandparents, as they offered to do for him after the death of the child's mother. He says he would have done so had they destroyed an agreement which he signed on the 4th December, 1911. This is an instrument under seal, prepared in view of the mother's impending death, so as to place the possession, custody, control, and care of the child in the hands of the grandparents, and providing that the father shall have access to the child at all reasonable hours. This instrument is upheld by the grandparents, but is being attacked in an action by the father to set it aside, which is now pending. I must regard this at present as a valid agreement which is binding on the father. It is not for me, on such material as I have before me, to anticipate a decision of the Court on this dispute. I have no doubt that the wishes of the dying wife were that the child should be left to the care of the grandparents.

The signed and sealed agreement of the 4th December, while it stands, appears to be a bar to any such application as the present; and it is valid in law under the statutory provisions in 1 Geo. V., ch. 35, sec. 2, taken from the revised statute in force when the deed was executed. But, apart from this agreement, I think, upon the material placed before me, that the interests of the child will be better subserved by letting her custody remain *in statu quo*; the father having all reasonable access to the child when he so desires; this right of access to be settled by the Local Master, if the parties cannot agree.

In *Re Davis* (1909), 13 O. W. R. 939; 18 O. L. R. 384, the head-note reads that the law of this province knows nothing of adoption; but the attention of the Court was not directed to the Act I have cited, and proceeded on the provisions of the Act relating to neglected children, and in particular those that can be called deserted and abandoned—which does not apply to this child.

It may be that the proper reading of the statute is, that the declaration that such disposition shall be good and effectual against all and every person claiming the custody and tuition of the child, does not include a father, if living. But I do not see any decided case to that effect. But, apart from the statute, if the agreement has been made by the father in pursuance of an understanding that the child was to be the heir to or inheritor of the property of the grandparents, and has been brought up by them under that impression, and if that is supplemented by an actual deed or will irrevocable to such effect, the Court, acting on principles of equity, will not, at the father's instance, disturb that arrangement. I refer to the considerations influencing the Court in such cases as *Lyon v. Blenkin*, Jac 245; *Roberts v. Hall* (1882), 1 O. R. 388, approved of in *Chisholm v. Chisholm* (1908), 40 S. C. R. 115.

Therefore, in the peculiar circumstances of this case, following *Ex p. Templer*, 2 S. & C. 169, I refuse to change the custody.

I do not award costs to either side.

I can only express the earnest desire that the parties may take thought and act reasonably and considerately on both sides, so as to preserve harmony in the family and avoid a devastating litigation in the Courts, which may go far to impoverish the moneyed litigant, and to embarrass the one who is poorer.

HON. MR. JUSTICE SUTHERLAND IN CHRS. MAR. 14TH, 1912.

REX EX REL. FROEHLICH v. WOELLER.

3 O. W. N. 838.

Election — Municipal — Councillor — Quo Warranto Application to Unseat — Alien — No Fiat Allowing — Absence of Date — Recognition — Application too Late — Municipal Act, s. 220 — Affidavits on Information and Belief.

Motion by way of *quo warranto* to unseat a municipal councillor on the ground that he was not at the time of election, and never was and is not now, a British subject, either by birth or naturalization.

SUTHERLAND, J., *held*, that the application was too late under Municipal Act, s. 220.

R. ex rel. Telfer v. Allan, 1 P. R. 212, followed.

That affidavit founded upon information and belief is inadmissible under Con. Rule 518.

Motion dismissed with costs.

A quo warranto application to unseat a member of the Municipal Council for the town of Waterloo, on the ground that he was at the time of his election an alien.

A. R. Lewis, K.C., for the relator's motion.

J. C. Haight, for the respondent, contra.

HON. MR. JUSTICE SUTHERLAND:—The applicant in his affidavit after setting out the election of councillor Woeller, the signing by him of the usual declaration of qualification and his acceptance of office, his attendance on and taking his seat at council meetings, his voting thereat and otherwise taking part in deliberations of the council, went on to say "5. That I am credibly informed and believe that the said Carl W. Woeller was not the time of such election or declaration, and is not now a British subject either by birth or naturalization."

The relator's affidavit was sworn on 28th February, 1912, and filed with the Clerk in Chambers on the next day. It stated that Woeller was nominated as a candidate for election as councillor on 22nd December, 1911, and there being no opposition was then declared elected by acclamation, and that he took the usual declaration of qualification on 8th January, 1912. No other material than said affidavit appeared to have been filed in support of it up to the time of the hearing on 8th inst.

Counsel for the respondent took the following preliminary objections to the motion, viz.:—

1. That the relator had not entered into a recognizance or obtained a fiat of a Judge allowing the recognizance before service of his notice of motion or filed any such recognizance before doing so pursuant to the provisions of the Consolidated Municipal Act, 3 Edw. VII., ch. 19, sub-sec. 220 and 222.

It was admitted on behalf of counsel for the applicant that no recognizance had been filed. He stated, however, that he had one in his possession and asked to be permitted to file it upon the motion. As produced it appears to have been entered into on the 29th February, 1912, and has upon it a fiat of the County Court Judge to the effect that it was allowed. There is no date on this fiat—see *Reg. ex rel. Chauncey v. Billings*, 12 P. R. 404.

2. That the application is too late. It is provided by said sec. 220 of the Municipal Act that "in case within six weeks after an election or one month after acceptance of

office by the person elected, the relator shews by affidavit to such Judge reasonable ground for supposing that the election was not legal," etc. Here the election was on the 22nd December, 1911, and the declaration of office and acceptance was on the 8th January, 1912. The notice of motion is dated 28th February, 1912. The application, therefore, appears to be too late. *Reg. ex rel. Telfer v. Allan*, 1 P. R. 214.

3. That the allegation in the affidavit of the applicant that Woeller was not at the time of such election or declaration, or at the time the affidavit was made, a British subject either by birth or naturalization, is upon information and belief, and that it is, therefore, inadmissible under Consolidated Rule 518. See *Gilbert v. Styles*, 13 P. R. 121. *Dwyre v. Ottawa*, 25 A. R. 121, at 129. *Robinson v. Morris*, 15 O. L. R. 649, at 653.

Effect, I think, must be given to the objections, and the motion dismissed with costs.

Since the above judgment was dictated on the 12th instant, and before it was handed out to-day, the applicant desired to file a further affidavit which I declined to permit as too late.

HON. MR. JUSTICE MIDDLETON.

MARCH 12TH, 1912.

YOULDEN v. LONDON GUARANTEE & ACCIDENT CO.

3 O. W. N. 832.

Insurance—Accident—Evidence of Cause of Death—Admissibility of Remarks at Time of Injury—Conditions in Policy—Not Complied with — Policy Renewed by Renewal Receipt — Insurance Act, s. 144—Sufficiency of Compliance with.

Deceased attempted to carry one end of a heavy timber. Shortly afterwards he remarked to his partner, who came to his assistance, that he was afraid he had injured himself.

MIDDLETON, J., *held*, that this remark was admissible as evidence and found as a fact that that caused his death, there being no other possible cause shewn to have actually existed.

Etherington v. Lancashire, etc., Ins. Co., [1909] 1 K. B. 591, followed.

In an action to recover upon an accident insurance policy issued to deceased in 1902 and renewed from year to year until his death in 1909.

Held, that while accident policies are contracts for one year only, yet the fact that the renewal receipts contained a clause that the policy was renewed "according to the tenor of policy 565996" was a sufficient answer to the defence that the Insurance Act, s. 144, divested the original policy of its conditions.

Action dismissed, as it was admitted that notice (made a condition precedent to right to recover under the original policy) had not been given.

Action by the plaintiff as beneficiary under a policy issued by the defendants, insuring the late Henry Youlden against accident and death from accident. The action was tried at Kingston on 27th February, 1912.

J. L. Whiting, K.C., for the plaintiff.

W. N. Tilley and C. Swabey, for the defendants.

HON. MR. JUSTICE MIDDLETON:—The deceased had been insured with defendants for some years, the policy having been issued on 7th January, 1902, and the renewal premium paid on 2nd January, 1909.

On June 23rd, 1909, shortly after his dinner, the deceased—a member of a firm carrying on a foundry business in Kingston—was at the railway station, superintending and assisting in the loading of a retort upon a railway car. The retort weighed about three and a half tons, and had to be transferred from a dray to the railway car by means of jacks and other appliances. For the purpose of making a way for removing the retort, a heavy stick of timber, lying upon the railway premises, was desired to be used. This weighed from five to six hundred pounds. Youlden attempted to carry one end of this while the other end was carried by two men. His partner Selby went to his assistance; and shortly afterwards Youlden remarked to him that he was afraid he had injured himself. He then sat in the shade at the station for a time, and feeling faint, he and Selby went to an hotel and he took a glass of whiskey and soda, and thereafter did no more work, but returned to the shop upon a rig, and sat around doing little or nothing until six o'clock, when he went home. The same evening, without taking any supper, he went to a garden party where a presentation was to be made in which he was much interested. During the evening he partook sparingly of ice cream, and went home at a little after ten o'clock. His wife, hearing that he was unwell, followed him home; and shortly thereafter he lay down upon a sofa to rest for the night in a dressing gown. During the night he was uncomfortable and restless, could not sleep, and, his wife said, "looked miserable and grey." Nevertheless he went to the office in the morning, but stayed there only a short time, returning in about half an hour. A doctor was called, and found him weak and in pain. He had then had a violent motion of the bowels, and appeared to be generally collapsed. By the evening his temperature was high

and there was further bowel trouble. The case developed into a case of acute *enteritis*, which would not yield to treatment, and finally caused his death.

The plaintiff claims that a strain was caused by the exertion of lifting the timber, and that this strain brought about a physical condition which enabled *bacteria* in the digestive tract to develop to such an extent that death resulted from his inability to resist their attack by reason of the reduced vitality following the strain in lifting the timber.

At the trial I admitted in evidence, against the protest of the defendants' counsel, the statement made by the deceased to his partner Selby, shortly after he had lifted the timber, that he thought he had hurt himself. It is argued that, apart from this, there is no evidence of the existence of a strain. The medical men stated that there was no physical condition indicating a strain; that the injury, if it existed, was internal only; and that the only knowledge they had of its existence would be from statements made to them by the patient of his symptoms and the history of the case. The symptoms made it quite plain that the malady was caused by the invasion of the system of pernicious *bacteria*. This invasion, in the opinion of the doctors, might well be occasioned by any injury to the system, which rendered it unable to manifest the normal resistance of a healthy and uninjured individual; but the result might follow equally from anything which would bring about a marked reduction of vitality, or it might follow from the introduction of pernicious *bacteria* in the food taken—the latter being the general origin of such a malady. The ice cream taken the evening before, if impure or tainted, would adequately account for the condition found.

It, therefore, becomes a matter of great importance to examine the propriety of my ruling. In *Garner v. Stamford*, 7 O. L. R. 50, the Divisional Court had to consider the admissibility of the statement made by the deceased when she was discovered a short time after an accident upon a highway. Her statement was made in reply to a question as to the cause of the injury. The statement was tendered as being part of the *res gestæ*, but was rejected; because the rule there invoked only makes statements admissible when they are involuntary exclamations at the time of the accident, and does not warrant the reception of statements or exclamations made after there has been time for reflection.

Gilbey v. Great Western Rw. Co., 102 L. T. 202, is a later decision of the Court of Appeal, perhaps somewhat closer to this case. Compensation was claimed in respect of an accident under the Workmen's Compensation Act. It was claimed that the deceased, while carrying a side of beef, so strained himself as to cause an injury to his lungs. The *post mortem* examination disclosed a tear in the lung and made it plain that this brought about death. The Judge of the County Court admitted in evidence the statements of the workman to his wife, not merely of his sensations and of his feelings, but as to the cause and occasion of the injury from which he was suffering. In the judgment of the Court of Appeal the principle applicable here is pointed out. Cozens-Hardy, M.R., says:—

“I do not doubt at all that statements made by a workman to his wife of his sensations at the time, about the pain in the side or head or what not, whether those statements were made by groans or by actions or were statements, would be admissible to prove the existence of those sensations. But to hold that those statements ought to go farther and to be admitted as evidence of the facts deposed to is, I think, open to doubt. Such a contention is contrary to all authority.”

The Irish Court of Appeal, in *Re Wright v. Kerrigan*, [1911] 2 Irish 301, had before it a claim under the Workmen's Compensation Act, where part of the evidence tendered was a statement of the deceased to a doctor as to how the injury was received. Cherry, L.J., mentions this evidence, saying:—

“Hearsay evidence is in some cases admissible, and the learned Recorder appears to me to have acted strictly in accordance with the settled rules of evidence . . . He ruled out statements as to the circumstances of the accident. He admitted the statements made by the deceased man to his medical attendant as to his symptoms and their cause. Such statements are usually held to be admissible upon the ground that there is no other means possible of proving bodily or mental feelings than by the statement of the person who experiences them.”

In *Amys v. Barton*, [1911] W. N. 205, the accuracy of this statement of the law was canvassed by the Court of Appeal, and Cozens-Hardy, M.R., pointed out that the words “and their cause” in the statement by Cherry, L.J., could not be supported, but appeared to approve of the rule as stated, with this exception.

In the 9th edition (1910) of Powell, 358, the admissibility of statements for the limited purpose of proving the physical condition of the person making the statement is asserted; and I think for this purpose the evidence was properly admitted, and it is sufficient to establish that shortly after the deceased had been engaged in lifting the timber he had, as he said, indications that he had been hurt. The statement perhaps did not go so far as to indicate that the lifting of the timber was the cause of the injury, but I think that this is an inference which may be drawn from the fact of the injury and falls within the principle indicated in *Evans v. Astley*, [1911] A. C. 678, where it is said:—

“The applicant must prove his case. This does not mean that he must demonstrate his case. If the more probable cause is that for which he contends, and there is anything pointing to it, then there is evidence for the Court to act upon. Any conclusion short of certainty may be miscalled conjecture or surmise; but Courts, like individuals, habitually act upon a balance of probability.” See also the decision of the Supreme Court in *McKeand v. Canadian Pacific Railway*, not yet reported.

Acting upon this principle, I find that the symptoms indicate that the deceased at this time did suffer an injury in lifting the timber in question; and I further find that this injury was the cause of his death. I believe this to be the cause, because, as I understand the medical evidence, it is a possible cause, and it is the only one of the several possible causes which is shewn to have actually existed. There is no evidence that the ice cream eaten was tainted; and the evidence satisfies me that up to the happening of the accident the deceased appeared to be in perfect health. This brings the case within the decision of the Court of Appeal in *Etherington v. Lancashire, etc. Ins. Co.*, [1909] 1 K. B. 591.

It is, therefore, necessary to consider the other matters dealt with upon the argument.

The policy issued in 1902 contains provisions and stipulations as to notice which it is admitted were not complied with, and which are made conditions precedent to the right to recover.

The plaintiff contends that the terms of this policy are not binding upon her, because the renewal receipt, as it is called, constitutes a new contract of insurance, and by sec. 144 of the Insurance Act “the terms and conditions of the

contract" not having been "set out by the corporation in full upon the face or back of the instrument forming or evidencing the contract," "no term or condition, stipulation, warranty or proviso, modifying or impairing the effect of any such contract made or renewed after the passing of this Act, shall be good or valid, or admissible in evidence to the prejudice of the assured or beneficiary."

Is this a new contract within the meaning of the statute? The original contract, unlike many insurance policies, does not contemplate any renewal. It is an insurance for one year, and one year only; and upon the principle acted upon by the Court of Appeal in *Carpenter v. Canadian Railway Acc. Ins. Co.*, 18 O. L. R. 388, the contract evidenced by the renewal receipt is to be regarded as a new insurance, depending entirely upon a new agreement between the parties. I do not think that this is at all in conflict with the *Agricultural v. Liverpool, etc.*, 33 S. C. R. 94, where the decision of the Court of Appeal, 3 O. L. R. 127, is reversed.

This new contract is, according to the terms of the receipt, a contract of insurance for a year "according to the tenor of policy 565996."

Referring in the first place to the statute itself, the intention of the Legislature appears to be plain. The contract to insure is to stand, but it is to be purged of all terms and conditions modifying the primary contract in the interest of the company and to the prejudice of the insured, unless the terms are set out upon the face or back of the instrument evidencing the contract. "Instrument" must be understood, in the light of the Interpretation Act, as meaning "instrument or instruments;" and the contention of the company is that the reference in the receipt to the original policy constitutes it one of the instruments forming or evidencing the contract, and that its terms are, therefore, binding and in the alternative that the reference to the former policy is a sufficient compliance with the Act. The contention of the assured is that the Legislature intended to render insufficient a mere reference to some other document in which the terms of the insurance are to be found, and requires the whole contract to appear on the face of the single sealed or written instrument which forms or evidences the contract. This argument is much fortified by sub-clauses (a) and (b), which expressly permit the application and the rules of friendly societies to be embodied in the contract by reference.

The cases I find to be very difficult. In *Venner v. Sun Life* (1889), 17 S. C. R. 394, the statute under consideration was the Dominion Insurance Act, R. S. C., ch. 124, sec. 27. This provided that "no condition, stipulation, or proviso modifying or impairing the effect of any policy . . . shall be good or valid unless such condition, stipulation or proviso is set out in full on the face or back of the policy." There the policy had been issued "upon the representation, agreements and stipulations" contained in the application; and the Supreme Court held that the section in question could not be relied upon as an answer to a claim that the policy was void by reason of misrepresentation contained in the application.

It is difficult to see how it could be thought that the section had anything to do with the question whether the contract had been obtained by fraud. Mr. Justice Taschereau, in the course of his judgment, does not pass upon this point, but says that if applicable the stipulation in the application "is in express terms referred to in the body of the policy, so that the appellant cannot invoke against the company, sec. 27." None of the other Judges referred to the point: Mr. Justice Gwynne giving reasons, the other three Judges simply agreeing that the appeal should be dismissed.

In *Jordan v. Provincial* (1898), 28 S. C. R. 554, an appeal from Ontario, the statute under consideration was the Ontario Act 55 Vict., ch. 39 sec. 33. This statute modified in some important respects the earlier Ontario Act 52 Vict., ch. 32, sec. 4 (which was in practically the same words as the Dominion Statute), and is identical with the present Ontario Act (sub-section "b" having been added in 1895 by 58 Vict., ch. 34, sec. 5, sub-sec. 10). The policy was substantially the same form as that under consideration in the *Venner Case*. It was issued in consideration of the statements contained in the application. There was material misstatement. The judgment of the Supreme Court is given by Sedgewick, J., who says: "We consider that the Ontario Insurance Act, sec. 33, was complied with in the present case, following, as we do, the decision in the case of *Venner v. Sun Life Ins. Co.*"

This precludes my independent consideration of the question, as I think it is an authoritative statement that notwithstanding the provision of the Act the section in question is complied with when the document relied upon is referred

to and sufficiently identified in the contract. Had the Supreme Court not seen fit to place its judgment upon this ground, I would have thought it apparent that the application might be identified by reference and that this express provision found in clause (b), went far to indicate that this was intended to be an exception to the general rule.

The question again arose in *Hay v. Employers Liability* (1905), 6 O. W. R. 459, where Mr. Justice Osler says: "What ever other construction we might have felt ourselves at liberty to place upon sec. 144, sub-sec. 1, of the Ontario Insurance Act, we are now bound by the decisions of the Supreme Court of Canada . . . to hold that the plaintiff's proposal and statements therein contained are by reference thereto in the policy sufficiently incorporated therewith and set out in full therein, within the meaning and requirements of the section." And in *Elgin Loan v. London Guarantee*, 11 O. L. R. 330, this statement is adhered to.

I cannot see any ground upon which I would be justified in attempting to distinguish the case in hand from what is said in the authorities referred to. These cases, as I have already pointed out, might have been rested upon the fact that the application is by clause (b), excepted from the more general provision of the section; but the Court has deliberately refrained from placing its decisions upon this ground and has preferred to adopt a construction of the clause which I fear has had the effect of nullifying the intention of the Legislature. If I am right in this, it is admitted that the plaintiff's action fails, and it is not necessary to consider the other question argued.

The action is dismissed without costs.

HON. MR. JUSTICE SUTHERLAND. MARCH 8TH, 1912.

HUCKELL v. POMMERVILLE.

3 O. W. N. 845.

Boundary—Building Erected Close to Line—Damage to Adjacent Property—Water from Roof—Nuisance—Destruction of Line Fence—Injunction—Damage—Costs.

G. S. Henderson, K.C., for the plaintiff.

G. F. Macdonnell, for the defendant.

HON. MR. JUSTICE SUTHERLAND:—The plaintiff is and for years past has been the owner of the easterly part of lot No. 37 on the north side of Cooper street, a residential street in the city of Ottawa, upon which is erected a substantial brick house, the easterly wall of which extends to or very close to the westerly limit of lot No. 38 adjoining.

The defendant in August, 1910, bought lot No. 38 which also has on it towards the easterly side a brick residence. There was between the two houses a considerable space of vacant ground, which before the purchase by the defendant had been a lawn.

The plaintiff was in August, 1910, absent from Ottawa and defendant informed his wife about his purchase, intimating that at first he had thought of building a private house on the vacant portion, but had changed his mind and desired to sell it. She says he offered the westerly 33 feet of lot 38 adjoining plaintiff's property for \$4,800, and suggested that if plaintiff would agree to keep it as a lawn he would remodel the brick house on the easterly portion. She told him she thought \$4,800 a high price for a lawn. Her husband being absent nothing was done. Later, defendant sold the easterly part of lot 38 and the brick house thereon to one Frazer. In the spring of 1911 defendant began to excavate the westerly or vacant portion of his lot to erect an apartment house thereon. He was stopped, it is alleged, for the reason that it would obstruct the lights in the Frazer house. Later, he erected a building or buildings running north from Cooper street, close to or on the line between said lots and shewn on a plan prepared by J. B. Lewis, O.L.S., put in at the trial.

The first building marked on the plan "Office" is of wood with metal sheeting having a frontage on Cooper street of 22 feet by a depth of 16 feet. Immediately north is a long wooden shed metal sheeted and open to the east. Immediately north is a large wooden stable metal sheeted. The west walls (or wall) of these three buildings form a continuous line running north from the north line of Cooper street and begin at a point a number of feet in front of the southerly face of the verandah on the south or front side of the plaintiff's house. There had been a fence for years in or near the line between the two lots which the plaintiff and defendant each claims was on his property. It was torn down by the defendant or his men in excavating for the

apartment house. The plaintiff's wife says she remonstrated and defendant stated in answer that he came to take it down "as he considered it in his way or on his property." She says the excavation was carried three or four inches in on plaintiff's property to the north of where the fence had been and under the east wall of the plaintiff's house.

On the 24th June, 1911, the defendant executed a lease in writing in favour of one John Duklow of part of lot 38 described therein as "No. 375 on the north side of Cooper street in the city of Ottawa from the first day of August next to the last day of April, 1912, being a term of nine months at a rental of \$30 per month clear. This is understood to be the stable at rear of above number to be erected and sufficiently completed for occupation by August 1st subject to the jurisdiction of the city laws." Evidence was given to the effect that Duklow when the stable was completed went into possession about the 1st of August, 1911, and continued therein for upwards of two months. He carried on business as the keeper of a livery stable or boarding and exchange stable. The plaintiff in the action claims with reference to the fence and excavation damages to the amount of \$100. He also claims that the buildings were so erected by the defendant that water from the roofs is thrown on to the plaintiff's property and is affecting the foundation of his dwelling house and the reasonable use and enjoyment of the plaintiff's verandah and property.

He also claims that by reason of the odours from the stable his use of his dwelling house is seriously interfered with and he has sustained loss and damage.

The plaintiff further alleges that the defendant acted improperly and maliciously in the matter of the erection of the buildings and with a desire and intention of compelling the plaintiff to purchase the westerly 33 feet of his lot at an exorbitant price.

He seeks an order compelling the defendant to remove the buildings erected by him on the property in question, restraining him from discharging rain water from the roofs of his buildings to the detriment of the plaintiff and his property, and from carrying on or permitting to be carried on the said livery business.

While the defendant's conduct does not appear to have been very neighbourly in the matter, and while the buildings are certainly not such as one would expect to see erected

on a residential property such as this is, I cannot see that he was not within his right in erecting them. It appears that his first intention was to build an apartment house. I do not see how the plaintiff could have objected to this. It also appears that the reason he did not carry out his plan was not in consequence of any difficulty with the plaintiff but with Frazer. The plaintiff, while complaining of the stable as mentioned, admits that Duklow conducted it reasonably well.

It appears that subsequent to the issue of the writ Duklow was obliged to discontinue his livery or exchange business through some action taken by the municipal authorities either in refusing him a license as a livery stable or otherwise. He was permitted by defendants to give up his lease. The building that was being used as a stable is apparently now a garage. It is said that the defendant talked somewhat of making the office building a Chinese laundry. Nothing was said about this to the plaintiff, however, but it appeared in an evening newspaper in the form of an interview between a reporter and the defendant.

The office building is naturally distasteful to the plaintiff, and very much curtails the view along the street in an easterly direction from his verandah.

In his statement of defence, besides denying the existence of any malice or want of good faith on his part in the erection of the building, the defendant says that he took the fence down with the object of improving the property and the appearance thereof from the street, and that the fence, as a matter of fact, was unsightly and detrimental to its appearance. As already stated he also claims that it was on his own property and in taking it down he acted within his rights. He also denies that any damage or injury has been caused to the plaintiff by any use made by him of the buildings on his property, but says that in any event the sum of \$15 which he brings into Court with his statement of defence is sufficient to cover any claim of the plaintiff against him.

Upon the whole evidence I am inclined to think and find that the fence was a line fence between the two lots and had been so construed and used by the parties to the action and their predecessors in title. I think the defendant was not warranted in taking the fence down and destroying it as he did without the consent of the plaintiff. The value of the fence was not very satisfactorily proved at the trial. The

excavation of which the plaintiff complained was filled up again and apparently he suffered no damage in consequence thereof.

At the request of counsel I had a view of the property and came to the conclusion from that and the evidence adduced at the trial that the buildings of the defendant are so constructed and existing as to shed water upon the plaintiff's verandah and against his house. The damage and inconvenience thus far caused to the plaintiff in respect to this has not been great. I think he is entitled to have the defendant enjoined from a continuance of it.

The plaintiff will have judgment against the defendant as follows:—

(1) An order restraining the defendant from discharging rain-water from the roofs of his buildings upon the plaintiff's property and damages, which I fix at \$5 for the injuries already sustained in this connection.

(2) To damages for the destruction of the plaintiff's share of the fence in question, \$20. From these two sums the \$15 paid into Court by the defendant will be deducted.

(3) His costs of suit on the High Court scale.

DIVISIONAL COURT.

MARCH 13TH, 1912.

MCCABE v. McCULLOUGH.

3 O. W. N. 836.

Deed—Reformation—Action for Declaration of Boundary—Possession—Damages—Survey—Evidence of Intention—Registry Act.

An action by a married woman of Hamilton against another married woman, a neighbour, for possession of certain lands which plaintiff alleged that defendant had wrongfully taken possession of, for damages and for a declaration setting forth the true boundary line between plaintiff's and defendant's property. The trial judgment declared that the plaintiff was entitled to possession as owner of a triangular parcel of land having a width of seven feet and nine inches on the west side line of the lot and enclosed by two straight lines running easterly to the fixed point between the parcels in the easterly boundary of these lots, which triangular parcel was in possession of defendant.

DIVISIONAL COURT, reversed above judgment, holding that the bargain with reference to both parcels was a bargain to sell up to the boundary fence. Conveyance should be reformed accordingly. Registry Act not an answer to action. No costs of action nor appeal.

BRITTON, J. dissented, being in favour of dismissing the appeal with costs.

An appeal by the defendant from a judgment of HIS HONOUR JUDGE SNIDER, of Wentworth County Court, dated 4th January, 1912.

The appeal to Divisional Court was heard by HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B., HON. MR. JUSTICE BRITTON, and HON. MR. JUSTICE MIDDLETON.

S. F. Washington, K.C., for the defendant, appellant.

M. J. O'Reilly, K.C., for the plaintiff, respondent.

HON. MR. JUSTICE MIDDLETON:—The Misses Doherty owned lot 65 and part of lot 64, on the south side of York street, Hamilton. Lot 65 was bounded on the east by Davenport street. These streets intersect at an obtuse angle, about five degrees greater than a right angle.

Two pairs of semi-detached houses are constructed upon the lands, fronting upon Davenport street. The boundary fence between the north pair and south pair of houses is erected approximately at right angles to Davenport street. It does not extend to the rear of the lot, but terminates at a barn upon the southerly portion of the lot, where there is a slight jog; and the northern wall of the barn has heretofore served in lieu of a fence.

On the 10th August, 1903, the Misses Doherty sold the northern pair of houses to the defendant. The conveyance describes the southern boundary of the parcel as running parallel to York street. This, of course, excludes a triangular parcel of the land, enclosed by the fence and barn.

On the 28th August, 1903, the purchaser, realising that this description was erroneous, asked for a confirmation deed containing a correct description; and the deed of that date was executed; but unfortunately the description contained in it is also erroneous, as it describes the southern boundary of the parcel conveyed as being parallel to the southern boundary of lots 64 and 65, which was itself nearly parallel with York street.

The following year the plaintiff purchased the two southern houses; and on the 12th April, 1904, the Misses Doherty conveyed to her the southern portion of the two lots, giving as the northern boundary of the parcel conveyed the southerly limit of the land conveyed to the defendant.

Upon the evidence it is quite clear that in both these transactions the intention was to convey up to the fence; and

this was assumed to be the boundary line, each party occupying to the fence line, until the dispute giving rise to this action which took place early in 1911.

This dispute was as to the ownership of the few inches of land lying south of the continuation of the fence and north of the barn. For the purpose of determining this dispute a survey was made, when the mistake as to the location of the boundary was discovered. This action is brought to recover possession of the small triangular parcel; and the defendant asks to have the conveyances rectified so that the descriptions may conform to the true boundary, as she alleges, i.e., the fence line. There is now no dispute as to the plaintiff's title to the few inches north of the barn.

The learned County Court Judge has held the parties bound by the conveyances, thinking that the evidence does not establish with sufficient clearness that the bargains differ from the conveyances.

A very careful perusal of the evidence satisfies me that the bargain with reference to both parcels was a bargain to sell up to the boundary fence.

I refer to the plaintiff's evidence, where she says:—

“What you bought was what went with the two houses? Yes. And you supposed until a year ago that that was all right? A. It was perfectly right

“You took what property was within that fence? I found out from the surveyor that the property that side was mine too.”

This was when the surveyor was called in on account of the defendant's resistance to the continuation of the fence in a straight line behind the barn, which was the only claim made by the plaintiff up to that time.

This being so, I see no difficulty in directing that the conveyances should be reformed so as to make the boundary between the two parcels the line of the boundary fence and that line produced westerly.

If I had not been able to find upon the evidence of the plaintiff that she only intended to purchase the land south of that fence I would not have thought that we could grant the relief sought, as the Registry Act would have afforded an answer to the defendant's equitable claim to reformation. See *Fraser v. Mutchmore*, 8 O. L. R.

The cases of *Russell v. Davey*, 6 Grant 165, and the *Utterston Lumber Co. v. Rennie*, 21 S. C. R. 218, justify this decision.

I do not think there should be any costs; either here or below.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—I agree.

HON. MR. JUSTICE BRITTON (*dissenting*):—The facts of this case, down to the time of the dispute between the parties are clearly and correctly set out by my learned brother Middleton. With great respect I am unable to agree that “upon the evidence it is quite clear that in both these transactions the intention was to convey up to the fence; and this was assumed to be the boundary line, each party occupying up to the fence line, until the dispute giving rise to this action which took place early in 1911.”

Up to the time of the dispute the parties occupied not only up to the fence line, as far as that fence extended, but also up to the barn, the defendant assuming that he was entitled to all the land lying north of the barn. The dispute arose, originating as to the land north of the barn—but really a dispute as to what was the true line between the parties according to their respective titles.

For the purpose of determining that dispute a survey was had. It is true that the defendant now abandons the few inches north of the barn and south of the line of fence produced westerly, but he still claims the land north of the fence and south of the true line as determined by the survey. I think the parties are bound by the survey. The survey is not in fact questioned—but the defendant asks for reformation of the conveyance to himself and also of the conveyance to the plaintiff. It is quite true that the plaintiff, at the time she purchased, may have thought that the fence was the true line, but the only way to interpret the intention of the parties—especially the intention of the plaintiff, is to say that the plaintiff intended to get what the conveyance to her gave.

I see no difference between this case and those so frequently, in other days, heard in the Courts as disputed boundary cases—for example:—

A. owns the N. $\frac{1}{2}$ of lot 1.

B. owns the S. $\frac{1}{2}$ of same lot.

A conventional line was established and a fence upon that line was erected across or part way across the lot between these holdings. C. a purchaser from A. of the N. $\frac{1}{2}$, saw the fence and knew that as between A. and B.—that was

called the line. C. upon taking possession thought B. had encroached upon and was in possession of part of what was really the N. $\frac{1}{2}$. This upon a true survey, was found to be the case—C. could recover from B.—unless B. had held possession of the part of the N. $\frac{1}{2}$ long enough to acquire a title by prescription. I am not able to say, beyond reasonable doubt, upon the evidence of the plaintiff that she intended to purchase only the land south of the fence.

The question of intention is one of fact.

The learned County Judge has found, and for reasons given by him, as follows:—

“I am satisfied by the evidence and the witnesses that the plaintiff thought she was buying the south end of these lots and that the parcel was 70 feet from north to south on both the east and west line although it turns out to be only about 56 feet front and rear. I do not think she had any definite idea of the point where her north boundary line touched the west boundary line of the lot. I find that she did not understand she was buying by any land mark or marks on the ground in rear, and she did not understand and had no reason to think the defendant had done so.”

I agree in the main with these findings—and for the reasons given, think the appeal should be dismissed with costs.

HON. MR. JUSTICE MIDDLETON.

MARCH 5TH, 1912.

JENNISON v. COPELAND.

3 O. W. N. 795.

Vendor and Purchaser—Title in Vendor—Third Party Served Notice Claiming to be Joint Owner — Purchaser Unwilling to Wait Termination of Litigation as to Third Party's Rights.

MIDDLETON, J., granted order for sale to be made pending litigation. Third party's claim at the most was problematical and capable of money measurement. Terms \$1,000 to be paid into Court to answer third party's possible claim.

Statute of Frauds may be answer to third party's claim.

Cody v. Roth, 28 N. Z. 565, referred to.

Motion by the plaintiff for an order allowing sale of land to be carried out pending trial.

M. R. Gooderham, for the plaintiff.

J. J. MacLennan, for the defendant, Copeland.

G. G. Plaxton, for the defendant, Lea.

HON. MR. JUSTICE MIDDLETON:—The title to the land is in the plaintiff. She has sold to Copeland, and Copeland

is ready to complete the purchase. Lea has served a notice claiming to be a joint owner of the land and that a partnership exists between the plaintiff and himself. The plaintiff has advanced substantially all, if not all, the money for the purchase of the land and the building of the house. According to Lea he has collected all money disbursed by him from Miss Jennison save \$150, and she has paid the rent some \$6,000.

The house has been vacant and unsold for over a year, and the plaintiff has made a binding agreement with Copeland and he refuses to wait the end of the litigation, because under his agreement he is entitled to the immediate possession of the house, and must move from his present residence. Lea's rights, if any, are capable of measurement in money and consist of a claim to this \$150 and half the difference between what Miss Jennison advanced and the selling value. His outside figure is \$600 or \$750 in all.

Lea's claim is at best problematical—The Statute of Frauds may be an answer. See *Cody v. Roth*, 28 N. Z. 565. And the injury done in event of the sale going off may be in fact irreparable, as he declines to give any security or even to undertake as to damages if his claim turns out to be unfounded.

I think there is power to order the sale to be carried out upon proper terms to secure Lea if he has a claim.

The terms should be:—

\$1,000 should be paid into Court, unless the parties agree to deposit to a special account, to answer any claim he may have.

If Lee has an interest in the property the plaintiff must justify to the satisfaction of the trial Judge that the sale is at an adequate price and must account upon the basis of the real value and not merely upon the price realized.

Upon these terms the land will be vested in the purchaser for all the estate of both parties and if necessary a receiver may be appointed to convey. In this case the receiver will retain the \$1,000 pending the litigation.

There would not seem to be any object in the purchaser further attending the litigation, and his costs may be directed to abide the result of the litigation, i.e., to be paid by the party failing upon the issue to be tried—as to Lea's interest in the land.

Costs in cause as between plaintiff and Lea.

HON. MR. JUSTICE SUTHERLAND IN CHRS. MAR. 14TH, 1912.

REX v. O'CONNOR.

3 O. W. N.

*Intoxicating Liquor—Selling without License—Offence Charged —
Amended to Taking Order for—Justices Conviction—Application
to Quash—Proof of Local Option By-law—New Offence Charged
after 30 Days—Liquor License Act, ss. 95, 104.*

The defendant was originally charged with selling liquor without a license on 27th November, 1911, which was amended at the hearing to "did on 2nd November, 1911 canvass for or receive an order for liquor."

SUTHERLAND, J., quashed defendant's conviction, holding that the two sections 95 and 104 of the Liquor License Act must be read together, and that the above amendments, made to the information on 8th January, 1912, substituting a different charge on a different date more than 30 days after the alleged commission of such different and substituted offence, were not properly made as they were made too late.

An application to quash a conviction made on the 13th January, 1912, by three Justices of the Peace, for taking an order for liquor contrary to the Liquor License Act, and fining him \$100 and costs.

J. Haverson, K.C., for the defendant's motion.

J. R. Cartwright, K.C., for the Crown, contra.

HON. MR. JUSTICE SUTHERLAND:—The charge as originally laid in the information on the 27th December, 1911, was that the accused did on the 27th November, 1911, "sell liquor without the required license." After one adjournment the case came on for final hearing and disposition on the 8th January, 1912. On that date the information was amended so as to read that the accused did on the 2nd day of December, 1911, canvass for or receive an order for liquor."

Three objections were taken to the conviction:—

First. That as made it did not state that the offence was committed in a township in which a by-law had been passed under sec. 141, of the Liquor License Act. It appears that the conviction when originally made and signed by the magistrates did not mention this fact. It also appears by a memorandum attached to the papers returned to the Court by the convicting magistrates as the record in the matter, that "Mr. Clay admits that the local option by-law is in force in said township." Mr. Clay was counsel for the

accused at the trial. Mr. Cartwright, the Deputy Attorney-General, had the conviction sent back, and thereupon the magistrates appear to have added the following words:—

“Such township being one in which there was at the time a by-law in force passed under sec. 141 of the said Act, prohibiting the sale of liquor by retail therein.”

Under these circumstances and with the admission of counsel aforesaid, I think the amendment was justified, and if necessary, it could now be amended in the way it was.

The second objection was that sec. 19 of the Act to amend the Liquor License Laws, 6 Edw. VII., ch. 47, under which the amended information was framed, as amended by the Act to amend the Liquor Licence Act, 9 Edw. VII., ch. 82, sec. 39, does not apply to a case such as this. The facts appear to be as follows. The accused is a telegraph operator at the village of Harrow. One, Perry Lipps, having been told that he might be able to get some liquor through the accused, went to him and asked him if he had any liquor there. He was told by the accused that he had not, but that he could telegraph up and get a bottle. A telegram was sent in the presence of Lipps by the accused for a bottle of Imperial whiskey, and it came down from Walkerville to Harrow by train, whereupon Lipps paid O'Connor \$1.25 for it and received the bottle from him. Lipps says that he went to the station to get O'Connor to telegraph for the bottle of liquor for him and intrusted him with the money to send for it, and that the bottle came down addressed to him, Lipps, and he took it away. He did not know the name of the liquor merchant who supplied the bottle of whiskey, except from the shipping bill. I am inclined to think that upon this evidence and apart from any disposition of this case on the further objection to the conviction, with which I will deal later, that it could be sustained. The liquor was got through O'Connor, who was active in the matter. Lipps did not know to whom to send. It does not appear upon the face of the proceedings that the telegram was sent in Lipps' name. An affidavit is filed by the accused's solicitor in which the following statements appear: “I acted for the defendant and on his cross-examination I procured from the Canadian Pacific Railway Company's office the telegraph message which the witness Perry Lipps said was sent for him and which the witness acknowledged. I asked to put it in as an exhibit, but it was refused by the Justices. Hereunto an-

nexed, marked Exhibit "A.," is the telegram referred to. No reference to the same appears in the proceedings before the Justices." The telegram is made an exhibit to said affidavit and reads as follows: "Harrow, 12, 2, 1911. C. J. Stogell, Walkerville, Ontario. Please send me bottle Imperial Whiskey first train. Perry Lipps." Counsel for the Crown objected to the admission of this affidavit, but even if it were admitted, I do not think it carries the case much farther. O'Connor assumed to hand over the bottle and take the pay for the liquor under the circumstances in question. I think he acted in the matter more than in the mere capacity of a telegraph operator. If Lipps had come there and without discussion had written out the telegram himself and handed it to the operator that might be a different matter. I think the evidence sufficient to warrant the Justices in the conclusion that O'Connor did receive an order and place it with Stogell.

But a third objection was taken to the conviction on the ground that when the amendment to the information was made on the 8th day of January, 1912, it was too late. Section 95 of the Liquor License Act provides that "All informations or complaints for the prosecution of any offence against any of the provisions of this Act shall be laid or made in writing (within 30 days after the commission of the offence or after the cause of action arose and not afterwards)," etc.

In this case the information was first laid on the 27th December for an alleged violation of the Act on the 27th November, 1911. The information was then amended on the 8th January, 1912, and a different and substituted charge laid for an alleged violation of the Act on the 2nd December, 1911. Section 104 provides as follows: "At any time before judgment the Justice, Justices, or Police Magistrate may amend or alter any information and may substitute for the offence charged therein any other offence against the provisions of this Act, but if it appears that the defendant has been prejudiced by such amendment the said Justice, Justices or Police Magistrate shall thereupon adjourn the hearing of the case to some future day unless the defendant waives such adjournment."

The contention of the accused upon this application is that sec. 104 did not empower the Justices to amend the information in such a way as to substitute a different offence

for the one originally charged unless it were done within 30 days from the date of the commission of the offence, and in any event not so as to enable a different offence to be charged on a different and later date more than 30 days before said amendment was made. Here the amendment made on the 8th January, 1912, was long after 30 days from the time when the original offence was said to have been committed, viz., on the 27th November, 1911. It goes further and states that the substituted offence was committed on a later date, more than 30 days before said amendment was made. There is no doubt that the offence substituted by the amendment is a different offence from that originally charged in the information.

Under these circumstances had the magistrates power after the 30 days to make the amendment in question? In the case of *Rex v. Ayer* (1908), 17 O. L. R. 509, it was held that where upon the hearing of complaints upon two informations for breach of section 78 of the Liquor License Act as amended by 5 Edw. VII., ch. 30, sec. 1, in selling liquor to minors, the Justices amended by inserting in the information the necessary allegation that the parties to whom the liquor was sold were "apparently or to the knowledge of the defendants under the age of 21 years" that under sec. 104 of the Act, the Justices had power to amend notwithstanding that 30 days had elapsed from the date of the commission of the offence charged.

The head-note contains the query: "Whether in view of sec. 95, this would have been permissible if the amendments had substituted other and different offences for those charged in the informations?" At p. 512, Meredith, C.J., who delivered the judgment for the Divisional Court, is reported as follows: "The other power conferred by sec. 104 of substituting for the offence charged in the information, any other offence against the provisions of the Act indicates clearly, I think, that the altering or amending of a defective information by remedying the defect in it was not thought or intended to be treated as a substitution of another offence for the offence charged. In other words, that though it may be that sec. 95 would prevent the substitution of another offence by an amendment made after 30 days from the time of its commission, as to which I express no opinion, there is no such bar to the amendment of a defective information by the adding to it of some statement necessary to constitute the offence which it did not contain."

The Court of Appeal of Manitoba in a case of *Rex v. Guertin* (1909), 19 Man. L. R. 33, held as follows: "An information under sec. 168 of the Liquor License Act, R. S. M. 1902, ch. 101, for furnishing liquor to an interdict, discloses no offence unless it alleges that the defendant had knowledge of the interdiction, and it becomes a new information if amended by introducing such allegation. If such amendment is not made within thirty days from the date of the offence, the magistrate has no jurisdiction to proceed on the amended information, and a conviction based upon it will be quashed on proceedings by *certiorari*."

These two judgments are not in accord. In *Rex v. Ayer* the effect of the amendment allowed was as stated in the judgment of Meredith, C.J., at p. 512, "merely to add words necessary to describe the offence intended to be charged in the informations which were insufficiently because incompletely described in them." See also *Reg. v. Hawthorne* (1899), 2 Can. C. C. 468.

I think the two sections of the Act must be read together and doing so have come to the conclusion that the amendments made to the information in the present case on the 8th January, 1912, substituting a different charge on a different date more than 30 days after the alleged commission of such different and substituted offence, were not properly made. I think they were made too late. The original charge was apparently abandoned and the substituted charge laid too late under the statute. The motion will, therefore, be allowed with costs.

The usual order will go for the protection of the magistrates.

BAIDER v. MAHON.

3 O. W. N. 848.

Principal and Agent—Agent's Commission on Sale of Hotel—Note given in Part Payment of Purchase Money—Agent to get Commission out of Note—Renewals—Notice of Agent's Interest in Note.

DIVISIONAL COURT affirmed judgment of MIDDLETON, J., 20 O. W. R. 549.

An appeal by the defendants the Josi Gatti Company from a judgment of HON. MR. JUSTICE MIDDLETON, 20 O. W.

It was now alleged that Adelia was not the granddaughter of the deceased but only of his wife and that the testator spoke of her as his granddaughter only to please the grandmother.

A. G. F. Lawrence, for the A. O. U. W.

F. Aylesworth, for John Riddell.

T. N. Phelan, for Adelia Pray.

CARTWRIGHT, K.C. MASTER:—It is clear there must be an issue to be tried at next sittings at Cayuga or some other convenient place. In this John Riddell will be plaintiff and Adelia Pray defendant—the issue being simply if she is a granddaughter or not of deceased.

As she was always so called by him I think the onus to disprove this is on John Riddell who must shew her real ancestry. Under the authority of *Knickerbocker v. Webster*, 17 P. R. 189, and cases cited, Mr. Pray though resident out of the jurisdiction cannot be required to give security for costs. See *Rhodes v. Dawson*, 16 Q. B. D. 548, cited and approved in the *Knickerbocker Case* supra.

This emphasises the distinction to be made according as an interpleader issue arises out of a sheriff's application or as in the present case.

HON. MR. JUSTICE MIDDLETON. MARCH 19TH, 1912.

TREMBLAY v. PIGEON RIVER LUMBER CO.

3 O. W. N. 894.

Timber—Contract for Sorting—Apportionment of Expenses—Evidence—Damages—Costs—Reference—Report—Appeal—Scale of Costs.

MIDDLETON, J. allowed plaintiff's appeal to extent of increasing amount awarded to the sum of \$712.13 and dismissed defendant's appeal.

Judgment for plaintiff for \$712.13, with costs of action, including motion for judgment on further directions, and costs of both appeals on County Court scale and one-half the costs of reference in County Court, with no set-off of costs.

An appeal by the defendants and cross-appeal by the plaintiff from a report of the Master at Port Arthur.

C. A. Moss, for the defendants.

W. A. Dowler, K.C., for the plaintiff.

HON. MR. JUSTICE MIDDLETON:—Tremblay, contemplating the making of a contract with the owners of a quantity of ties upon the Kam river, for their sorting and loading, entered into a verbal agreement with the defendant company—who owned the logs and pulpwood with which the ties were mixed—that the ties should be sorted at the defendants' sorting-jack in the river and that the expense of sorting should be borne in proportion to the quantity of timber sorted. This agreement was not in writing, and is very vague in its terms, as there is no standard by which the expense of handling the different kinds of timber can be ascertained. The Master has found that in the result the expense shall be shared equally; and upon the argument it was practically conceded that this finding could not be interfered with.

Shortly after the making of the agreement a freshet swept the mingled mass down the river, and carried away the booms of the sorting-jack. The sorting-jack was afterwards replaced, and all the timber that then remained above it passed through it and was duly sorted. The timber below the replaced jack was saved, and boomed near the loading-jack. The plaintiff sorted out of this the ties for which he was responsible, leaving the logs and pulpwood mixed. He claims some remuneration for this. The Master has disallowed this claim, and I think rightly so, for these reasons.

The sorting that was contemplated by the agreement was in the first place a sorting at the sorting-jack; and secondly, the sorting down at the loading-jack was not effectual, because all that was done was to remove the ties, leaving the logs and pulpwood yet to be handled.

Each party makes claim against the other for damages for delay. No doubt there was some delay, and I think it may fairly be said that delay is properly to be attributed to each of the parties; but I do not think that the evidence is sufficient in either case to found a claim for damages.

The agreement for the joint operation of the sorting jack was adequately met by its operation, subject to all the contingencies which invariably arise in connection with an operation of that kind. Tremblay was a man of some experience, perhaps not of the highest degree of efficiency, but

he was no doubt known to the defendants when the agreement was made; and in order that any claim for damages could be sustained in the case of a joint undertaking such as this, I think the evidence must go far beyond what I find here.

Upon the argument it was admitted that of the total time spent upon the work—say ninety-one working days—about ten days were idle days, owing to circumstances for which the defendants were in no way responsible.

The case then resolves itself into the comparatively simple one of apportioning the cost of the operation of the sorting jack. The plaintiff had five men outside of the cook, and he had also two men engaged upon the boom. The defendants had one man at the sorting-jack, in addition to a checker, whose functions seems to have been to count the logs passed and does not fall within the expense to be divided. To equalize, this means that the defendants ought to pay the plaintiff the wages of three men for eighty days and their board for an additional fourteen Sundays.

I take the Master's figures for the wages, \$2.25 per day, plus 75 cents for board. This would make a total of \$720, and for the board on the Sundays a further sum of \$31.50, or \$751.50 in all. In this computation I disallow anything for the cook, because to allow it would be duplicating the charge for board.

This result corresponds fairly with the plaintiff's own estimate of his claim upon this head, which he places at \$735; and I, therefore, prefer his figure as being probably more accurate.

The defendants should also be allowed half of the sum paid for the replacing of the sorting-jack. The Master makes this \$45.25; one-half being \$22.62. Deducting this from the \$735 will leave \$712.13.

I think the plaintiff's appeal should be allowed to the extent of increasing the amount awarded to this sum, and that the defendants' appeal should be dismissed.

In the elucidation of this comparatively simple matter one is shocked to find that the evidence upon the reference extended over many days and that the report of the evidence covers 230 pages. Much of this time was absolutely wasted, if one may judge from the chaotic condition of the evidence, by reason of the failure to conduct the reference in an orderly way. No steps were taken to define the issues to be tried; and I fear the result of the litigation will be that

the amount of the plaintiff's claim must be much depleted by the way in which his case was presented. The action could have been brought in the District Court, as the plaintiff's claim is under \$800. At the same time, the defendant is not free from blame, because its counterclaim is not only without foundation, but grossly exaggerated.

As near an approach to justice as I can arrive at is that there shall be judgment for the plaintiff for the amount found in his favour, with the costs of the action, including the motion for judgment on further directions and the costs of both appeals upon the County Court scale, and that he should have one-half of the costs of the reference, also upon the County Court scale, and that there should be no set-off of costs.

HON. MR. JUSTICE SUTHERLAND.

MARCH 19TH, 1912.

RE MILLIGAN SETTLED ESTATES.

3 O. W. N. 895.

Estates—Settled Estates Act—Order under Granted—Authorizing Sale of Lands—Terms—\$28,000—\$2,000 Cash to be Paid into Court — Mortgage for \$26,000 to Accountant of Supreme Court of Judicature—Both Subject to Trusts in Will—Agent's Commission on Sale and Costs out of Estate.

Motion by Mary A. Campton, a daughter of Frederick Milligan, for sanction of Court to a proposed sale of part of the estate settled by the said Frederick Milligan.

Hamilton Cassels, K.C., for the petitioner.

F. W. Harcourt, K.C., for the infants.

HON. MR. JUSTICE SUTHERLAND:—A clear case seems to be made out for a sale to the proposed purchaser of the real estate in question at the price of \$28,000 upon the terms set forth in his written offer to purchase.

I, therefore, make an order as asked granting the prayer of the petitioner to that end and authorizing such sale.

Following the usual practice the deposit of \$200 and the further cash payment of \$2,800 on account of principal moneys to be made upon completion of the sale, will be paid into Court to the credit of this matter and subject to the trusts under the said will, and the mortgage for the bal-

ance of the purchase-money in the terms of the offer be made to the accountant of the Supreme Court also subject thereto. The agent's charge for commission on the sale as mentioned in said offer to purchase and the costs of the petitioner and Official Guardian will be paid out of the corpus.

MASTER IN CHAMBERS.

MARCH 14TH, 1912.

HON. MR. JUSTICE MIDDLETON.

APRIL 6TH, 1912.

MACDONALD v. SOVEREIGN BANK.

3 O. W. N. 849.

Evidence—Foreign Commission—Application for—Affidavit on Information and Belief—Not Admissible under Con. Rule 518—Testimony Sought Unnecessary—Admission.

MASTER-IN-CHAMBERS, dismissed motion with costs.

MIDDLETON, J., *held*, that the action should be allowed to proceed to trial without this evidence; the plaintiff undertaking, in addition to what he had already undertaken, that if in the opinion of the trial Judge, when the facts came to be developed before him in evidence, the witness can give any testimony that will be of any assistance whatever, the defendants will be at liberty then to have a commission for the purpose of taking his evidence, so that it may be put in before judgment is given. If this course is productive of any additional expenses at the trial, the trial Judge would have ample jurisdiction to deal with it. Subject to these variations the order was affirmed. Costs in the cause unless otherwise ordered by the trial Judge.

An appeal by the defendant from an order of the Master in Chambers, refusing to issue a commission to Los Angeles to take the evidence of A. E. Webb.

The action was for a declaration that plaintiff was not the owner of 70½ shares of the stock of the defendant bank standing in his name, alleging that the bank was and always was the real owner of same.

The statement of defence denied the plaintiff's allegations and set up that the shares in question were all duly transferred to plaintiff by the previous holders. The matter had been thoroughly elucidated in the cognate action of *Stavert v. McMillan*.

The defendant moved for a commission to Los Angeles in California to take the evidence of one A. E. Webb, a broker, formerly doing business in Toronto, and whose name appeared in the evidence in *Stavert v. McMillan*, a case now on its way to the Privy Council.

W. J. Boland, for the defendants' motion.

G. H. Kilmer, K.C., for the plaintiff, contra.

CARTWRIGHT, K.C., MASTER (14th March, 1912):—
There is no intimation of what Webb is expected to prove.

The only affidavit in support of the motion is one by defendant's solicitor in which he says of A. E. Webb: "Who I am informed and believe purchased the stock which is the subject of the action for Randolph Macdonald the father of the plaintiff, etc."

No grounds of such information and belief are given and the affidavit is, therefore, not strictly admissible. See Rule 518—which is more honoured in the breach than in the observance.

But waiving that objection a very full affidavit is filed in reply by plaintiff's solicitor setting out the whole transaction as given in the appendix in the *McMillan Case* and shewing that the shares in question had passed into the name of the plaintiff before Webb appeared in this connection.

The whole onus is on the plaintiff and he is willing to admit that none of the shares the subject-matter of this action were transferred from A. E. Webb & Co. to the plaintiff or to any of his alleged predecessors in title of the shares now in question.

This, I think, renders it unnecessary to issue the commission—and according to the judgment of the Divisional Court in *Hawes Gibson v. Hawes*, 20 O. W. R. 517; 3 O. W. N. 312—it should, therefore, not be granted—and the motion will be dismissed with costs in the cause to the plaintiff.

From above judgment defendants appealed to HON. MR. JUSTICE MIDDLETON in Chambers.

W. J. Boland, for the defendants, appellant.

G. H. Kilmer, K.C., for the plaintiff, respondent.

HON. MR. JUSTICE MIDDLETON:—The learned Master refused the order upon an admission by the plaintiff that none of the shares forming the subject-matter of this action were transferred from A. E. Webb Company to the plaintiff or to any of his alleged predecessors in title. After hearing counsel for both parties and considering the material, I am not quite clear that this admission is wide enough to protect the defendants. I am, however, convinced that it is extremely

unlikely that Webb will be able to give any evidence which will in any way be material to the matters in question to the action; and the plaintiff's counsel has expressed his readiness to submit to any terms that may be deemed proper to protect the defendants if this view is erroneous. The case is one to be tried without a jury, and no inconvenience can be occasioned by the adoption of the course that I suggested upon the argument, namely, that the action be allowed to proceed to trial without this evidence; the plaintiff undertaking, in addition to what he had already undertaken, that if in the opinion of the trial Judge, when the facts come to be developed before him in evidence, Webb can give any testimony that will be of any assistance whatever, the defendants will be at liberty then to have a commission for the purpose of taking his evidence, so that it may be put in before judgment is given.

It appears to me on the evidence given in *Stavert v. Mac-Millan*, that there can be no difficulty in tracing the shares held by the plaintiff, and that at the trial it will be found that this commission will be quite useless. If the course suggested is productive of any additional expense at the trial, the trial Judge will have ample jurisdiction to deal with it. Subject to these variations, the order will be affirmed; costs to be in the cause unless otherwise directed by the trial Judge. I make this provision as to costs, because at the trial it may appear that the whole application was misconceived, and in that case a variation of this order may be proper.

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COURT OF APPEAL.

APRIL 15TH, 1912.

CLARK v. LOFTUS.

3 O. W. N. ; O. L. R. .

*Insurance — Life — Friendly Society Benefit Certificate—Change of
Beneficiary—Agreement not to Change.*

COURT OF APPEAL reversed judgment of Divisional Court, 19 O. W. R. 606; 24 O. L. R. 174; 2 O. W. N. 1288, declaring defendant entitled to the money in Court, subject to repayment to plaintiffs of amount paid by them for rates and assessments in respect to the insurance certificate. Costs to defendant throughout.

GARROW, J.A. (dissented), being in favour of affirming the judgment of Divisional Court.

An appeal by the defendant Florence D. Loftus from a judgment of Divisional Court, 19 O. W. R. 606; 24 O. L. R. 174; 2 O. W. N. 1288, affirming a judgment of HON. MR. JUSTICE MIDDLETON at trial.

The appeal to Court of Appeal was heard by HON. SIR CHAS. MOSS, C.J.O., HON. MR. JUSTICE GARROW, HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MEREDITH and HON. MR. JUSTICE MAGEE.

G. H. Watson, K.C., and J. T. Loftus, for the defendant, appellant.

J. B. Clarke, K.C., and E. J. Hearn, K.C., for the plaintiffs, respondents.

HON. SIR CHAS. MOSS, C.J.O.:—One James E. Clark, a member of the Independent Order of Foresters and the holder of an endowment certificate issued by the Order and dated the 6th of March, 1893, for the sum of \$3,000, payable

as in the certificate set forth, died on the 16th of February, 1910. Thereupon a dispute arose between the parties hereto as to the right to receive payment from the Order of the \$3,000 in question. The amount less expenses was paid into Court by the order. Pursuant to an order of Court these proceedings were instituted for the determination of the question as to which of the parties was entitled to the moneys and if more than one was entitled, the proportions in which they were to share.

In the certificate all three were named as beneficiaries, but by an instrument signed by him and dated the 29th of November, 1909, Clark designated the defendant Florence Loftus as the sole beneficiary reserving to himself the right of revocation and substitution of other beneficiaries in accordance with the constitution and laws of the Order. This instrument remained unrevoked at the date of his death.

The question for trial therefore was as to the validity of this instrument. It was not admitted by the plaintiffs but at the trial it was clearly proved that the signature attached to the instrument was Clark's, and it is not open to question that as executed by him it is in form and substance sufficient to effect the desired change of beneficiaries.

But the plaintiffs alleged that at the time he signed the instrument Clark was in such a mental condition as to be unable to comprehend the nature of the instrument or the effect of what he was doing and that the defendant taking advantage of his mental condition and by the exercise of fraud and undue influence induced him to sign the instrument. They further alleged that even if competent he was precluded from altering the original nomination of beneficiaries by reason of an agreement between him and the plaintiff Jane Clark that he would not make any change in the beneficiaries.

The learned trial Judge held the instrument of the 29th of November, 1909, to be invalid and ineffective but chiefly on his view as to Clark's mental condition when he signed it and as to the duty which he considered was cast upon the defendant of satisfying the Court that Clark properly understood and appreciated the effect of his act. He also expressed the opinion that an agreement was in fact made between Clark and the plaintiff Jane Clark but in view of the amendments made to sections 151 and 160 of the On-

tario Insurance Act he rested his judgment principally upon the other branches of the case. In the Divisional Court the judgment was affirmed upon the latter grounds. Mr. Justice Clute by whom the principal judgment was delivered held that in view of the amendments, effect could not be given to the agreement. The Chief Justice of the Common Pleas reserved his opinion as to the effect of the amendment. Mr. Justice Teetzel agreed in the result. So far, therefore, as expressed opinions are concerned it may be taken that while it has been found that there was an agreement in fact, it could not avail to preclude Clark from making the change of beneficiaries. As I have reached the conclusion that an agreement in fact has not been proved it is not necessary to consider the effect of the statute as amended. As to what is said to have taken place between Clark and the plaintiff Jane Clark on this point there is no conflict of testimony, the proof resting upon what was deposed to by the two plaintiff's taken in the light of subsequent conduct and events. Upon the testimony I am with deference of the opinion that no agreement is shewn. I think that at the time in the year 1900 when it said the agreement was come to there was no bargaining and no intention to bargain about the matter. It happened that Clark through losses in his business and inability owing to poor health to earn any considerable income concluded that he was unable to keep up the payments called for by the certificate. The matter appears to have come up in conversation between him and the plaintiff Jane Clark who had separate means. In her testimony in chief she thus stated what took place: "Q. When he failed in business did he say anything to you about this insurance? A. Yes, he came and told me that it was to my benefit and to the benefit of the children to keep that policy up. Q. What else did he say? A. He said that we were—as we were beneficiaries for value? Q. He said that you were to pay the usual assessments? A. Yes. Q. And if you did not what would happen? A. He said it would be a loss to me and to the children. Q. How would it be a loss to you and the children? A. Simply because I was paying on it and of course he said he had no means to pay it. . . . Q. Then he said it was for the benefit of you and the children? A. Yes. Q. What children? A. We never made any difference between Florrie and my own. We were all very agreeable.

Q. You were to pay the usual assessments for the benefit of yourself and the children? A. Yes. Q. Did you pay the dues and assessments after that? A. I did." On cross-examination she was asked "Q. What happened in relation to the insurance? A. Well, he had no money to pay on it and I paid it. Q. That was all? A. Yes I paid it. Q. Was there anything said? A. Yes, he told me it was a benefit for me and my children to keep that policy paid, and I did so out of my own means. . . . Q. But he did not make an agreement with you or anything of that kind? A. Yes, he told me that me and my daughters were beneficiaries and that it was to my benefit to keep the policy paid up and for the benefit of the children. His Lordship: Q. Yourself included? A. Yes. Mr. Loftus: Q. Why didn't you state that before? A. This is the first time I have had anything to do with anything like this. That's right and Mrs. Loftus knows it. . . . Q. That is all that was said? A. That is all; he said it was to our benefit."

The testimony of the other plaintiff though varying slightly in terms does not carry the matter further. It is true that in answer to the question "Was there anything said about it?" she answered "Yes, my father told my mother in my presence that he had no means since he failed and that it was to her benefit, my sisters and my own to pay that insurance, and as he had no money to do it that she should do so out of her own money and that she should be benefited by it hereafter and that it would be hers." But in her answer to the next question she shews that it was not her understanding that it was to be her mother's any more than any of the others. Asked "Were you to get any benefit of it?" She answered "Yes, the understanding was that we were to share and share alike." Now making all proper allowance for the suggested inexperience as a witness of the plaintiff Jane Clark which may be considered as very fairly offset by the assistance rendered by her counsel in the form of leading questions I am unable to find in this testimony the ingredients of an agreement such as has been found. Clark stated what was very probably true that he was unable to pay and said what was obviously true that it would be to the benefit of the beneficiaries to keep the certificate on foot. He put it before his wife as a matter for her consideration but he made no request that she should pay or any stipulation as to what he would do or would not do

if she continued the payments. That matter was never considered or discussed by them. She was left free to act on his suggestion or advice or not at her pleasure. Whether as a matter of fact some of his means were not employed in making some of the subsequent payments is by no means clear. It is shewn that he turned over his earnings to his wife and there was a common fund. As shewing that she knew that she was not bound to continue the payments herself she admits that she made application to the defendant to contribute. Payments were continued to be made by or through her up to the 30th September, 1908, when she ceased making them—and but for the subsequent payments being continued by the defendant the certificate would in all probability have lapsed. So far as the plaintiffs were concerned they had abandoned all intention or desire to keep it on foot any longer.

The element of agreement should, I think, be entirely eliminated from the case.

Upon the other branches I am also unable to agree to the conclusions reached by the trial Judge and the Divisional Court.

These conclusions appear to me to be based upon a misapprehension as to the duties and obligations of the defendant under the circumstances disclosed by the testimony and as to the onus of proof at the trial. No doubt the burden may shift from time to time during the progress of the trial and it may be assumed that in the course of this trial the onus varied from time to time as in other cases. The question is upon whom was it resting, having regard to the testimony given, at the time when the evidence closed.

It having—as before mentioned—been shewn beyond question that the instrument impeached was signed by Clark it is scarcely necessary to say that the onus of shewing that it was for some reason or reasons invalid and ineffectual was cast upon the plaintiffs.

Clark had the right by law to change the nomination of beneficiaries within the scope of the certificate and in order to avoid his act it was incumbent upon those impeaching its effect to shew mental incapacity unfitting him to execute the instrument with knowledge and appreciation of its effect or that he was induced to execute it through fraud or undue influence, or that the defendant in whose favour the nomination was made stood in a fiduciary relationship to—

wards her father, that is, that she occupied such a position of trust and confidence in regard to him as to necessarily lead to the conclusion that she possessed a controlling influence over his mind and actions. If the latter case were established then the onus might be cast upon her to support the transaction and the question whether she had satisfactorily shewn all that was required would arise, but only in that case.

It was not alleged nor was it proved or found that the defendant stood in a fiduciary position towards her father. She was his daughter, but she was neither his trustee, guardian nor agent. There is no evidence that at any time during his life had he reposed any special trust or confidence in her. There existed between them nothing but the natural affection of father and daughter; no relationship that called upon the daughter to justify or explain her father's action. Assuming capacity and the absence of fraud or undue influence the act was one within his rights however unreasonable or unjust towards others it may appear.

Apart from agreement with which I have already dealt Clark was in no manner a trustee of the certificate or for any of the parties named as beneficiaries; and his act is binding and conclusive unless the plaintiffs have proved a case of mental incapacity or fraud or undue influence.

I have given careful attention to the evidence as well as to the adverse comments of the learned trial Judge upon the testimony of some of the witnesses and after making every allowance for the advantage which is necessarily enjoyed by the trial Judge from having seen the witnesses and noticed their demeanour I am unable to adopt the conclusions arrived at. It may be that if I shared the views of the Courts below as to the burden of proof I should not disagree with their findings. But if, as appears to me, it lay upon the plaintiffs to prove their case, then I think they failed to discharge the onus.

It has been said more than once that it is a fallacy to suppose that the affirmative is proved because the witness for the negative is not wholly and entirely to be believed. The affirmative must be proved and to say that a witness for the negative is not wholly to be believed is in no sense of the word to prove the affirmative: *Nobel's Explosives Co. v. Jones* (1881), 17 Ch. D. p. 721, at 739.

The learned trial Judge was disposed to deal with the question of capacity as upon the same footing as if the act was a testamentary act. As the instrument was intended to take effect in Clark's lifetime it was probably more in the nature of, though not in all respects similar to, a gift *inter vivos*. It differed from the latter in that it was not absolute in effect, because of the reservation of a power of revocation.

But however regarded the evidence fails in my judgment to establish a want of capacity to understand the nature of the transaction or to appreciate its effect. Clark was no doubt in poor health, and had been so from the time when he suffered from an attack of paralysis in January, 1909. According to the testimony of the plaintiff Jane Clark he was then in the hospital for about three weeks after which he returned home. In April he was sufficiently recovered to go and visit an old friend the witness Crompton at his farm near St. Catharines where he remained until some time in June, a period of about 8 weeks. He appears to have been considered as of sufficiently good health and capacity to take care of himself to be allowed by the plaintiffs to make the journey each way unattended. The evidence fails to shew any material failure in health or mind between his return in June and the signing of the instrument on the 29th of November. He appears to have suffered pains in his head produced by a blow from a trap door in his factory falling upon him and which induced the first paralytic condition. But he went about the streets conversing with his neighbours and calling upon his daughter the defendant without it occurring to anyone that he should be attended. The trivial incidents related by the plaintiffs as indicating mental weakness are wholly insufficient to establish want of capacity, or inability to understand what he was doing when he signed the instrument. It was a single and simple transaction in connection with a certificate with the purport and effect of which he was quite familiar for he had considered and discussed it on more than one occasion. His signature appended to the instrument compares quite favourably with that appended to the agreement concerning the additional rates made with the order in September, 1908, and presents every appearance of having been written by one quite capable of controlling his faculties. And it is to be noted that the learned trial Judge says that he is not satisfied that Clark had not testamentary capacity.

Beyond vague suspicion there is really no evidence of fraud or undue influence such as is required to be shewn in order to invalidate such an act as that here impeached. It is important to bear in mind that there was no secrecy about the matter; no retaining the instrument so as to prevent scrutiny and enquiry. It was sent on to the order immediately and the plaintiffs were afforded opportunities not only of seeing the instrument, but Clark was shewn to have visited the plaintiffs from time to time afterwards and they had every opportunity of ascertaining whether or not any improper suggestions had been made to him or his mind otherwise unduly influenced. But beyond endeavouring to induce the order to refrain from recognising the instrument nothing was done or attempted.

The defendant had paid the arrears due in respect of the certificate after the plaintiffs had abandoned making payments and she kept it on foot from that time onwards. Otherwise it would have lapsed and have been of no benefit to anybody. Having done so, there was no reason why her father should not if he chose put her in the position of sole beneficiary. In doing so he was not bestowing upon her an extravagant sum and he may very justly have considered that his wife having considerable property of her own and having shewn no disposition to keep the certificate on foot his daughter by his first marriage through whose payments it had been kept on foot might without unfairness receive the full benefit of it.

I would allow the appeal and declare the defendant entitled to the moneys in Court subject, however, to repayment to the plaintiff Jane Clark of the sums paid by her in respect of dues and assessments as offered and agreed to by defendants' counsel.

As to the costs; the defendant is entitled to her general costs of the interpleader proceedings, of the issue and of the appeal to the Divisional Court and to this Court.

HON. MR. JUSTICE MACLAREN:—I agree.

HON. MR. JUSTICE GARROW (*dissenting*):—Appeal by the defendant from the judgment of a Divisional Court affirming the judgment of Middleton, J., in favour of the plaintiffs upon the trial of an issue between the parties as to the ownership of certain money in Court, the proceeds of a policy on the life of the late James E. Clark.

James E. Clark was the husband of the plaintiff Jane Clark, his second wife, and the father of the plaintiff May Clark. He was also the father of the defendant by his former wife.

The policy dated March 6th, 1893, was in the form of an endowment certificate issued by the Independent Order of Foresters, and the beneficiaries therein named were the plaintiffs and the defendant in equal shares.

In the month of January, 1909, James E. Clark had a severe stroke of paralysis from which he never completely recovered. Up to the month of November, 1909, he resided with his wife and children other than the defendant in a house owned by his wife, but on the 22nd of that month he left his home and went to reside with the defendant, where he remained until his death on the 16th of February, 1910. After the stroke he had been in the habit of going frequently to the defendant's house. Two days before he went finally to reside with her he informed her of his intention to leave home.

In her evidence the defendant said: "About the 20th of November, my father came to me and he was crying; he started crying and said they had another quarrel over home with Mrs. Clark and that he was not going to stand her nonsense any longer, that if I could not take and do anything for him he would go into some Home, and it was then we first spoke about his coming to live with me. He came two days after that."

On the day that the deceased came to live with the defendant, steps were taken to alter the apportionment of benefit under the policy by giving it all to the defendant, and a written document to that effect was prepared and executed by the deceased and sent to the insurers, but had not been assented to by them in his lifetime. The defendant says, the suggestion came first from the deceased, but even on her own shewing she seems to have had no compunction in accepting the change, and even in assisting her father to bring it about.

There had, as the plaintiffs contend, been an agreement between the deceased and the plaintiff Jane Clark, made several years before his death, that if she would keep up the payments of premiums on the policy the deceased would not change the apportionment. And in pursuance of this arrangement the plaintiff and her daughter May had made a

defendant concerning the transaction, and it is not even pretended that there was independent advice.

Under these circumstances the transaction in question is one which in my opinion cannot be supported, and the appeal should be dismissed with costs.

HON. MR. JUSTICE MEREDITH:—The dominating factor in the conclusions reached in this case hitherto was that which was considered great unfairness in the result of the transaction which is in question in this action: had that result been the opposite of that which it was, that is had it changed the beneficiaries from the one only to the three, no one can doubt that it would have been unhesitatingly and firmly upheld. It was its want of “righteousness” that caused its downfall.

Mr. Justice Clute seems to me to have put that very plainly, for himself and as to the trial Judge: After quoting the oft quoted words expressed by Lord Hatherley in the case of *Fulton v. Andrews*, L. R. 7 E. & I. App. 447, at p. 472:—“But there is a further onus—upon those who take for their own benefit, after being instrumental in preparing or obtaining a will. They have thrown upon them the onus of shewing the righteousness of the transaction;” he goes on to say:—“The rule appears to me to be applicable to a case of this kind which closely resembles a will; so far from the evidence removing the suspicious nature of the transaction and shewing the same to be a righteous transaction, quite the reverse is the case. The learned trial Judge largely discredited the evidence of the defence, and considered the transaction a most unrighteous one.”

So that two things seem to me to be evident:—(1) that there has been a grave misunderstanding of the meaning which Lord Hatherley intended to convey by the word righteousness; and (2) that this case is not at all like that with which he was dealing, on such cases as *Barry v. Butler*, 7 Moo. P. C. 480, or *Tyrrell v. Painton*, [1894] Pro. 151.

“Righteousness,” as applied to proof in such cases, means no more than that the document propounded is really the will of the testator, that it is the duty of those, asking the Court to pronounce in favour of the will, to prove affirmatively that the testator knew and approved of its contents; to import into the word any such meaning as that it must be proved that the will is a fair or just one, or such as a rea-

sonable man ought to make is, of course, entirely wrong; a testator may be as unreasonable, unjust, or capricious as he pleases, without the Court having any power to control him; the character of the will may, of course, afford evidence upon the question whether the paper propounded is really the testator's will; but some care must be taken to fairly treat such things only as evidence; that we do not make them an excuse for finding against the validity of the will really because we do not approve of its contents. The man or woman who makes a will is, it may be, the only one who knows what is just and fair, and, in the absence of such knowledge as he or she could impart, one should be very careful of condemning his dispositions of his property.

On the other point it is not necessary to do more than point out that this is not the case of a controversy arising for the first time after a testator's death in propounding a writing, as his last will and testament: the controversy arose in his lifetime and was carried on for some time before his death, and before his second stroke of paralysis, and carried on by him on the one side, seeking registration of his change of beneficiaries, and the respondents on the other side opposing it, in the offices of the friendly society whose certificate of insurance is the subject-matter of this litigation. If there had been any real doubt of man's knowledge and approval of the change he had made, or of his capacity to make it, or that he had duly signed the writing, all that could at once have been set at rest, by asking him, but that was not done, nor was any attempt, on the part of the respondents, made to investigate it; they knew that it had been done, and that they could not undo it.

The learned trial Judge said, among other things in which I am quite unable to agree with him, that "the law calls upon the "person who so takes to explain the circumstances in such a way as to remove all shadow of suspicion from the mind of the Judge who is called to pass upon the case." The rule is simply this:—the onus shifts; presumption of knowledge and approval of the contents of the will, from proof of its due execution by a competent testator, to whom the will was read over, or who has read it, is displaced; actual knowledge and approval must be proved by those who take a benefit under it, and who have been instrumental in making it; the conscience of the Court must be satisfied, that is all.

Again I am quite unable to agree with him in these observations also contained in the reasons for his judgment:—"The situation was one which, more than any other situation one can think of, called for the exercise of great precaution. I think it called for Mr. Clark receiving advice from an absolutely disinterested and independent solicitor." It was but a single transaction of a very ordinary and simple character; the man had become dissatisfied with his home, and desired to change it, to go and live with the only child of his first wife. He may, or may not, have had real cause for that desire, that in itself is not material, he had, as I have said, a right to be capricious, he had a right to do just as he pleased with his own. His conduct was not unique, it was not even extremely uncommon; as one grows old the impressions of earlier days are more vivid and attractive than those of later days, and one is apt to become exacting and more readily dissatisfied; and there is at least this to be said in extenuation of this conduct of the man who is not here to justify himself, that no great efforts, if indeed any efforts, were made to dissuade him from going away or to induce him to remain or return. He had got to that age and condition of health that he was no doubt more or less a burden to those with whom he lived, and there can be little if any doubt that, rightly or wrongly, he was impressed with the idea that his wife thought so. I am quite unable to perceive anything so complicated or extraordinary in the circumstances as to require the services of any solicitor, or what there was in the simple and single transaction that any layman could not quite comprehend. The man knew his wife and two children were to share equally in the money payable under the certificate upon his death—if not changed; he knew that he wanted to change that so that one daughter should have all, and that all that was needed to effect the change, could be readily accomplished through the officers of his "lodge." He knew also that his wife had property of her own of considerably greater value than this certificate; and that he had no other property which could go to the child of his first wife.

The learned Judge was also emphatic in the opinion that he ought to have been advised that he was receding from a binding bargain made with his wife, that the beneficiaries of the certificate should not be changed. In that I am quite unable to agree because (1) no such agreement is proved,

and (2) if there had been, there would be no object in advising him not to do a thing he had no power to do. If there were no binding agreement, it was no part of a solicitor's duty to advise him on the moral aspect of his conduct; a solicitor has enough to do in keeping his client right in law.

That there was no such agreement in fact seems to me to be plain enough. Notwithstanding the controversy which arose fully and sharply in the man's lifetime there was no assertion of any such contract. In the first statutory declaration of the wife, in her opposition to the charge being made in the society's records, she made no sort of assertion of any such agreement. In a supplementary declaration made eight days afterwards for the sole purpose of making such a claim she put it in these words:—

“1. That when I began to pay the assessments on the benefit certificate on the life of my husband, James Clark, about eight years ago, as set forth in my said former declaration, it was at the request of the said James Clark that I did so, he intimating to me that as my daughter, May Clark, and myself were two of the beneficiaries named in the said policy, and as he had failed in business, his membership in the order, and the benefit certificate would have to lapse, unless I kept the assessments paid, and many times after that, through the period of about seven years that I kept the assessments paid out of my own money, he frequently spoke to me, encouraging me to keep the assessments paid, and I did so with his knowledge and on the understanding that myself and my daughter May were to be beneficiaries for value in the said benefit certificate.

“2. I am sure that my husband did not expect, during that period, that he would be able to change the beneficiaries in the said policy from myself and our daughter, May Clark, without my ‘consent’ and her consent, and I would not have paid the said assessments or any of them, but for the fact that she and I were two of the beneficiaries named in the said benefit certificate. And I now claim, as the fact is, that she and I are beneficiaries for value, and I positively object to any change being made in the beneficiaries as they stand in the said benefit certificate.”

Not only is no such contract proved, but, if the case had been tried by a jury, there would have been no reasonable evidence to submit to them in support of any claim that there was.

The man having been obliged to give up his business and his earning powers being greatly impaired, was unable to keep up the periodical payments necessary to keep the certificate in force: there were then, practically, but two things which might be done, either abandon it, or else make the payments through the family purse to which his wife, through the property which she owned, appears to have been the chief contributor from that time on. To abandon would have been foolish; to keep up the payments in that way was really the only thing to be done; and they all acted accordingly, until the man left the household and went to live with his oldest child, when payment out of the household purse ceased and payment was taken up by that child.

There is really no sort of evidence of any kind of a binding agreement; if there had been, the wife broke it when she ceased making payments, and contradicted, if she did not break it, when she, long before that, endeavoured to make the oldest child contribute towards the payments.

There could have been no contract unless the wife was bound by it; and how was she in any sense bound? How could she have been compelled by anyone to make the payments? Nor was it suggested, by any of the witnesses, that the husband was to retain any separate legal right to an interest in the certificates, or to any of the moneys which might become payable under it; so that if the wife had taken over the insurance, as she now claims, it would not be for value; all the payments which she made would be voluntary and for her own benefit only; but that was not the character or effect of the dealings between them; it was merely the case, and the not uncommon case, of keeping up the payments out of the family purse, as I have said. There is no suggestion by anyone that any kind of provision was made for the possibility of the benefits of the certificate becoming available in the man's lifetime; that was never taken into consideration, as it must have been if the parties were definitely contracting in regard to the rights to accrue under the certificate. It was simply the common case of the family taking up the burden of the payments when the head of the house became disabled from fully meeting them. The man did not cease to pay, he continued to pay all that he was able to pay; his earnings, though perhaps little, all went into the family purse. No attempt was made to procure an assignment of the certificate or of any rights under it, nor was anything

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of the sort even suggested, as it doubtless would have been if the man were to be precluded of all his rights under it. It was the every day case of trusting to the husband and father not to alter his will. It is out of the question to speak of anyone as a beneficiary for value of this certificate; such a contention is really like catching at a straw to save oneself from drowning.

But if anyone had been meant to be a "beneficiary for value" it would be in the teeth of the plainly and emphatically expressed intention of the legislature that no one can be a beneficiary for value unless expressly so designated in the certificate; and I decline to attempt to dodge that enactment because I am carrying a hard case which tempts me to do so. If the man had lived long enough to become dissatisfied with his new home and had gone back to his old one, and had again changed the beneficiaries, back to his wife and her daughter, a thing which might very well have happened, I can hardly think the other daughter would be held to be a beneficiary for value, although she took on, even, a former understanding that if she paid the premiums the benefits would be altogether hers.

There is no finding of want of mental capacity, on the part of the man, to make the change of beneficiaries in question; really the contrary has hitherto been found, and rightly so. The man was no doubt much impaired in physical and mental vigor; it may be that he was not either physically or mentally capable of carrying on any trade or business, but many a one may be so incapable, and yet capable of making a will; and in this case there was unquestionable mental and physical capacity to make, and thoroughly understand, the change of beneficiaries which he did make—there can be no doubt he knew the simple fact that he was taking from his wife and his daughter, by her, one-third each of the \$3,000 so paid under the certificate, and giving the whole sum to his only child by a former wife, a thing which, wise or unfair, just or unjust, he was determined to do; and there can be no doubt that when doing it he knew that his wife had property of her own, and that her son and daughter were able to earn, and were earning, their own living; he knew a vast deal more than we can on the subject of the moral righteousness or justness of his act.

Nor has it been found that there was any undue influence exercised by anyone over the man to bring about the change; indeed it seems to be plain that the intention originated in himself, arising, in part, at all events, in his dissatisfaction, whether reasonable or unreasonable, with his own home, and in his desire to leave it. There was nothing like exclusion from intercourse with his wife and her children after he left the household; he was indeed a frequent visitor there, according to the wife's testimony, even while the contest over the change of beneficiaries was being waged in the society:—

“Q. You say he went to Mrs. Loftus' in November, 1908, had he been at your house after that? A. Yes, he came over next morning, and came over every other day for a week or so, while he was able to go out.

Q. Up to what date? A. I don't know, but I know he came over the whole time he was there, while he was able to go out; while he was able to walk from Mrs. Loftus', he came over to see me.

Q. He was able until after New Year's; was he over after New Year's to your place? A. Well, I cannot say whether he was or not; he was over, but he had two strokes in Mrs. Loftus' house. I did not know when he had them. I was not notified of them.

Q. Was he over after the first stroke? A. Yes, after the first stroke he had at Mrs. Loftus'.

Q. That was about the New Year? A. Then he came over after that.”

After the inability of the trial Judge—though so strongly desirous of upsetting the transaction—to find undue influence; and after the inability of the Divisional Court to do, it would be an extraordinary thing for this Court to do so even if there had been some substantial evidence of it, and even if the persons concerned were not the reputable people the evidence shews them to be.

If I were at liberty to substitute my will for that of the dead man in the distribution of this money I would very willingly cancel the later “designation,” and set up the earlier one, in accordance with my sense of what would be fairer and juster in the dim light which the case throws upon the knowledge which the man had, and upon his real and full reasons for acting as he did; but as I have no manner of doubt that the change was made by him of his own free will, I have no more power to alter it, according to my

notions of moral right and wrong, than he if living would have to change my will.

I would allow the appeal and give effect to the change; which was made under the statute and so is not controlled by the rules of the society. According to the practice of this Court, and as I understand the consent of the appellant the money paid by the respondents or any of them in keeping the certificate in force, with interest, should be repaid out of the fund in Court.

I have not gone into the question, dealt with by Mr. Justice Clute, whether any such rule as that involved in the case of *Andrews v. Fulton* is applicable to such a case as this; that is not necessary, if the transaction were a contract, it would not apply, if it were a gift merely some such rule might very well be applied, for after all it comes down to this simply: Was the act, mentally and physically, really that of the donor?

COURT OF APPEAL.

APRIL 15TH, 1912.

RE TORONTO & TORONTO R^w CO.

3 O. W. N.

Street Railways—Municipal Lines—Order of Ontario Railway and Municipal Board—Ordering Opposition Street Railway Company to Operate—Validity of Order.

The city having decided to build a street railway upon St. Clair avenue and Gerrard street, in the city of Toronto, applied to the Ontario Railway and Municipal Board for an order of the Board directing and ordering the railway company to afford all proper and reasonable facilities for the receiving and forwarding of passenger traffic upon and from the several railways belonging to the Toronto Railway Co., and those to be constructed by the city, and providing for the return of cars, motors and other equipment belonging to either the city or the railway company and used for the purposes of receiving or forwarding such traffic, so as to afford all passengers on the cars of the municipal system passage over the tracks of the railway company as a continuous line of communication and without prejudice or disadvantage in any respect whatsoever.

ONT. R^w. & MUN. Bd. granted the order as asked.

COURT OF APPEAL allowed the appeal of the Toronto R^w. Co., and set aside the above order with costs.

An appeal by the Toronto R^w. Co. from an order of the Ontario Railway and Municipal Board, dated 24th June, 1911.

The appeal was heard by HON. SIR CHARLES MOSS, C. J.O., HON. MR. JUSTICE GARROW, HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MEREDITH, and HON. MR. JUSTICE MAGEE.

H. S. Osler, K.C., for the Toronto Rw. Co., appellants.

P. H. Drayton, K.C., and G. A. Urquhart for the municipality, respondents.

HON. SIR CHARLES MOSS, C.J.O.:—In the view which I take of the question raised by this appeal it is not necessary to discuss or consider at length many of the arguments which were forcibly presented against and in support of the order appealed from.

As a practical operative order it works no substantial advantage to the city and it imposes no real disadvantage upon the company. It settles nothing of a practical nature, and as a declaratory order does nothing towards making effective the provisions of sec. 57 of the Ontario Railway Act as between the parties hereto.

Whether if the Board had the power to issue the order it rightly exercised it is a question with which we have no concern. It is right to assume that when its power to determine is invoked the Board will not undertake to determine without having first informed itself of all the existing conditions, and considered whether the circumstances shewn make it just and proper to put the provisions of the section into effect as between the street railways then before it.

The question of power turns, as it appears to me, upon the proper view to be taken of sub-sec. (6) of sec 57 of the Railway Act, read, of course, in connection with and in the light of the other portions of the section.

I am unable to satisfy myself that in this case the circumstances had arisen which, upon a careful study of the section, I think must occur before the power under sub-sec. (6) is called into action.

It is, of course, undeniable that primarily the provisions of the section only deal with steam railways, and are intended to govern the regulation and interchange of traffic between transportation agencies of that character. And it is also quite plain that the legislation contemplates existing operating companies actually engaged in carrying traffic, which includes, no doubt, passengers as well as goods. Thus sub-sec. (1) providing for agreements between companies speaks

of "traffic passing to and from the railways or the companies," of "the working of the traffic over the said railways," of "the division and apportionment of tolls, rates, and charges in respect of such traffic," and of "the appointment of a joint committee or committees for the better carrying into effect such agreement." So, too, sub-sec. (2), imposing upon a company an obligation to afford facilities to other companies, speaks of "the receiving and forwarding and delivering of traffic," of "the return of carriage, trucks, and other vehicles," of a company "having or working a railway which forms part of a continuous line of railway, or which intersects any other railway," of the duty of such a company to "afford all due and reasonable facilities for receiving and forwarding by the one of such railways all the traffic arriving by the other."

Again, sub-sec. (3), dealing with penalties, speaks of refusal or neglect "to receive, convey, or deliver at any station or depot of the company for which they may be destined, any passenger, goods or other things brought, conveyed, or delivered over or along the railway from that of any other company intersecting or coming near to such first-mentioned railway."

All these point plainly and unmistakably, not to projected or contemplated railways, but to railways actively engaged in the business of conveying passengers and goods upon and over their lines. It is only when they are found in that condition that they can be usefully rendered available for carrying out the objects aimed at.

Sub-section (4) brings the Board into requisition where there is a failure or inability to agree as to the regulation and interchange of traffic or any other of the matters provided for, and empowers it to determine upon an agreement according to the terms of which the mutual services prescribed by the previous portions of the section shall be performed by the parties interested.

But before the Board's powers can come into play it must find, and be prepared to deal with, a case of (a) at least two existing operating companies engaged in receiving, forwarding and delivering traffic with railways forming parts of a continuous line or intersecting each other or having terminal stations or wharves near to each other; in fine, operating and carrying on the business of transportation of passengers or freight or both, under the circumstances detailed in the

preceding portion of the section, and (b) inability to agree as to the regulation and interchange of traffic or in respect to the other matters provided for.

Now is there anything in sub-sec. (6) to shew that in the case of street railways there is to be any different mode of treating the matter?

It says "this section," that is the preceding provisions of the section, "shall apply to such street railways as may from time to time be determined by the Board." It is intended by this enactment to do more than to apply the provisions of the section to street railways which the Board shall find holding towards each other, relatively at least, the same position as steam railways? That it was not so intended seems to be manifest from the language. Under sub-sec. (4) the powers of the Board only arise when there has been inability to agree upon the matters there specified. And these powers are confined to determining in respect of these matters. Sub-section (6) enables the Board to deal with street railways, but does not say that it is to do so under circumstances different from those under which they deal with steam railways by virtue of sub-sec. (4). In other words, the Board when it finds two or more existing operating street railways before it upon application made by one or more of the parties interested, is to determine whether as regards the street railways before it, there is a case proper for intervention under sub-sec. (4). It may be that the Board should have regard, upon such an application, to the differences in methods of transport and the conduct of business between the two systems, but there does not appear to be any warrant for such a wide departure from the manifest object and scope of the section as to adapt it to a case where there are not two existing and operating lines before the Board upon the application.

The application is intended to result in something practical in the form of an order determining the terms and conditions upon which the regulation or interchange of traffic is to take place. There is no indication anywhere that the Board is to deal with any but a state of circumstances outlined in sub-sec. (4).

For these reasons, I think, that under the then existing circumstances the order made was not within the scope of the Board's powers under sec. 57, and that it should not stand.

The appeal should be allowed, with the usual result as to costs.

HON. MR. JUSTICE GARROW and HON. MR. JUSTICE MACLAREN:—We agree.

HON. MR. JUSTICE MEREDITH:—The main part of the respondent's application to the Board makes manifest its premature character; it is in these words:—

"The applicant hereby makes application for an order of the Ontario Railway and Municipal Board, directing and ordering the respondent to afford all proper and reasonable facilities for the receiving and forwarding of passenger traffic upon and from the several railways belonging to the respondent, and those to be constructed by the applicant upon St. Clair avenue and Gerrard street, in the city of Toronto; and providing for the return of cars, motors, and other equipment belonging to either the applicant or the respondent, and used for the purpose of receiving or forwarding such traffic, so as to afford all passengers on the cars of the municipal system passage over the tracks of the respondent company as a continuous line of communication without unreasonable delay and without the prejudice or disadvantage in any respect whatsoever, and so that no obstruction may be offered in the use of the Toronto Railway system and lines to be laid by the applicant as a continuous line of communication, and so that all reasonable accommodation may at all times be mutually afforded by and to the said applicant and the said respondent."

To an ordinary mind it must seem extraordinary, at the least, for anyone to apply for an interchange of passenger traffic, cars, motors, and other equipment, not only without having any to interchange, but without having even a railway to run them over; indeed so extraordinary that, although the Board was plainly anxious to aid the applicant all it could, this part of the application is not even adverted to in the formal order made by it upon the application.

The earlier provisions of the enactment in question—The Railway Act, sec. 57—make it clear to me, upon their face, that they relate only to existing railways. The agreement which railway companies may make is for the "interchange of traffic passing to and from the railways" of such companies, evidently existing railways capable of actually mak-

ing such an interchange; and in practice almost necessarily so. Then every railway company is to afford reasonable facilities to any other railway company for receiving, forwarding and delivering traffic upon and from the several railways belonging to or worked by such railway companies respectively; again existing railways of course. And then a penalty is provided for refusal or neglect to forward traffic, over, necessarily, an existing railway.

All this seems to be so plain, and so, for practical purposes, necessary, that there was little, if any, controversy over it; but it was urged, for the respondents, that, under sub-sec. (6) of the sec. 57, the Board had power to determine that that section should apply to the appellants' railway; Mr. Drayton seemed to take refuge in this last ditch; but for several reasons, in my opinion, he cannot hold it; in the first place the order in question was not made upon the Board's own motion, but was based entirely upon the respondents' application, upon which they can take nothing, and which they had no power to make; and, therefore, the order was made without jurisdiction; in the second place, the Board had no intention to make, and did not make, any such order; its order was intended to embrace, and does in terms embrace, both parties to the application and the railway of the one and the proposed railway of the other; to strike out that part of the order which relates to the respondents, and their proposed railway, and to let the rest stand would be to make a new, and different, order of a very different character and effect from that intended to be made, and actually made, by the Board; and one which I can hardly think they would have thought of making; and which, if they had made it, could not, in my opinion, stand. The purpose of the Board was to make provision so that there should be an interchange of traffic between the railway of the appellants and that of the respondents when it came into existence; and that alone was the purpose of the application to them by the respondents. Take away the order against the respondents and what remains is something never contemplated by the parties or the Board, and which, I should imagine, no one desires. It would give the prospective railway of the respondents nothing; they would be obliged to apply again to the Board when they have a real railway, not merely power to build it; whilst the effect upon the appellants and their railway would be this, that they would be bound to interchange traffic,

including carriage, trucks, and other vehicles, with every "steam" railway under the legislative powers of the Legislative Assembly; and also with any other street railway, municipal or otherwise, which the Board might see fit to bring into the provisions of sec. 57, or which is already within them under sub-sec. (6); that is, of course, if the Board's power be as wide under that sub-section as the respondents contend for; but, lastly, its powers under that sub-section is in my opinion much narrower than that, and does not extend to the making of an unlimited order of that character. reading the whole section together and having due regard to the purpose of the legislative gathered from the whole Act, sub-sec. (6) applies only to interchange between existing street railways: it does not authorize the making of an omnibus order against any street railway company, putting upon it an obligation to interchange with every sort of a railway under provincial legislative power with the limitation only that as to other street railways an omnibus order shall be made respecting them. The very nature of the thing seems to me to require that the order shall be limited to two or more definite existing railways, to be made only after a consideration of the particular case in the public interests as well as of the interests of the companies directly concerned. The respondents cannot want, indeed it would be obviously against their interests to want, the appellants' railway thrown open to others and not to them; their need is interchange between their railway when built and that of the appellants, but only if that can be beneficially accomplished; and they ought not, merely to save themselves from the position of having failed altogether in their application, to catch at and try to hold on to something that does them no good, but harm, as well as grievously and needlessly hampering the appellants already over-loaded railway. It is quite true that the applicants ought not to be delayed until the last spike of their construction is driven; but, on the other hand, it is at least, equally plain that they ought not to begin their application before the first spike is driven; it can hardly be that even the first spike constitutes a "Railway." The pitiful picture painted by the chairman, of waste in the duplicating of works is almost, if not altogether, a fanciful one only; and one which, if there really could be anything in it would not be got rid of, or even ameliorated, by the order in question which gives nothing to the respondents; until the final agree-

ment, or order, for interchange, should be made there would be just as much uncertainty as there is now; an uncertainty which cannot really affect materially, if in any way, the mode of construction of the proposed railway.

A much more real picture of that character might be drawn from a study of the effect of an unlimited order adding to the burden of already overcrowded cars, and overburdened rails, complaint, inconvenience, and bad feeling, as well as to the danger to life and limb, which that burden already carries.

There is obviously a vast difference, in this respect, between "steam" railways and street railways; to the former, with their comparatively infrequent trains and the matter of merely attaching other cars to them, the freest interchange is, generally speaking, manifestly in the public interests as well as in the interests of all else concerned; between street railways, with already overcrowded rails, as well as cars, cars which are run separately and when it may be practically necessary to send, not only the cars, but also the crews of the one company over the lines of the others, a very different, and a much more difficult problem arises, and one which can be fairly dealt with only when the railways are in existence and after the most careful consideration of all the then existing circumstances—circumstances which are changing in some respects from time to time, and with especial regard to lessening rather than running any risk of increasing the already terrible toll of lost life and limb in street railway accidents.

I can have no manner of doubt that if the position of the parties were reversed, if the municipality were the owners and operators of the central system, and some private corporations were projecting the outlying railway, this particular application would be generally scoffed at.

I am in favour of allowing the appeal, and discharging the order in question altogether.

HON. MR. JUSTICE MAGEE:—The by-law and orders of the Ontario Railway and Municipal Board under which the city of Toronto corporation is acting, were not before us on the argument, but were before that Board, or at least, within its cognizance upon the city corporation's application for the order now in appeal, a copy of By-law No. 5626, which will be referred to has since been put in, and also a copy of the

opinion of the Board, dated 23rd June, 1911, approving of the plans and profiles submitted by the city as to car lines on Gerrard street and Coxwell avenue and on St. Clair avenue.

The appellant Toronto R^W. Co. own and operate the street railway within what was formerly the city of Toronto, but new territory has since been added to the city and the proposed street railways of the city or some of them are to be within the new territory.

As a municipal corporation the city would be enabled under sec. 569 of the Consolidated Municipal Act, 1903 (as amended in 1906 by 6 Edw. VII., ch. 34, sec. 21, and in 1910 by 10 Edw. VII., ch. 81, sec. 4), to pass with the assent of the electors a by-law for building, equipping, maintaining, and operating street railways along such streets and subject to and upon such terms as the Lieutenant-Governor in Council might approve, and for leasing the same from time to time and for levying an annual special rate to defray the interest and principal of the expenditure. No other statutory authority is referred to as empowering the city to construct or operate a street railway. By the Ontario Railway and Municipal Board Act, 1906, 6 Edw. VII., ch. 31, sec. 53, that Board is given the powers of the Lieutenant-Governor in Council as to approval or confirmation of such by-laws. By the Ontario Railway Amendment Act, 1910 (10 Edw. VII., ch. 81, sec. 3), a railway company shall not without first obtaining the permission of the Board begin the construction of a railway upon a highway, and this shall apply to a street railway, and by the Ontario Railway Act, 1906 (6 Edw. VII., ch. 30), a "street railway" is declared to mean a railway constructed or operated along a highway under or by virtue of an agreement with or by-law of a city or town. Thus the Board's approval of the by-law (or that of the Lieutenant-Governor in Council), would be necessary and also the Board's permission before beginning the construction on the streets.

A by-law was passed by the city council with a view to the construction of some street railway lines. In the Board's reasons for the order, of June 24th, 1911, now in appeal, it is stated that "the city submitted a by-law to the ratepayers to authorize the issue of debentures to the amount of \$1,157,293, to pay for the construction and equipment of street railways upon certain streets to be selected by the council, with the approval of this Board. The by-law was

carried by an overwhelming majority." The Board then goes on to state, "On the 25th of April last, the city made an application to the Board for the approval of the plans for the construction of the civic car lines on Gerrard street and Coxwell avenue from Greenwood avenue to Main street, and on St. Clair Avenue from Yonge street to the Grand Trunk Railway crossing. The Board in an opinion dated the 6th day of May, 1911, declined to approve the plans and profiles until the city furnished us with particulars of the whole scheme for building, equipping maintaining and operating the civic car lines. We stated in that opinion that we required to know all the streets the city intended to use for the lines, the mileage, the kind of rail, the character of the construction, kind of car barns and repair shops, the number and kind of cars to be operated and an estimate of the cost of construction, operation and maintenance and of the revenue to be derived from the enterprise. The city have complied with this demand of the Board, and have furnished us with the required particulars and details of the scheme. The Board have approved of the plans and profiles and of the scheme generally. We are informed that the city have ordered the rails and other material necessary for the construction of the lines."

We find in the statutes of 1911 (1 Geo. V., ch. 119, sec. 8), that a city by-law No. 5626, passed 23rd January, 1911, for the raising of \$1,157,293, the amount mentioned by the Board, was declared valid.

In the letter of May 5th, 1911, to the company's manager, counsel for the city stated, "As you know the different routes under contemplation by the city, and for which the by-law has been passed by the people are as follows (1) St. Clair avenue . . . (2) Davenport road and Bathurst street . . . (3) Rosedale loop . . . (4) Danforth avenue . . . (5) Gerrard and Main street . . ." The letter goes on to state the estimated cost of constructing a double track with an 80-lb. rail on each of these routes. So far as appears By-law No. 5626 is the only by-law passed. It recites that by a report of the Board of Control adopted in council "it is recommended that a by-law should be passed to provide for the issue of debentures for the amount of \$1,157,293 for the purpose of building and equipping street railways, and of laying permanent pavement upon the railway portions upon certain streets of the city," and that the

council had determined to issue debentures to that amount "for the purpose of raising the amount required to pay for the construction and equipment of street railways upon certain streets to be selected by the council with the approval of the Ontario Railway and Municipal Board, in those parts of the city annexed thereto since September, 1891, and for the laying down of permanent pavement upon the railway portions of such streets." The by-law then authorized the issue and sale of the debentures and the proceeds thereof . . . shall be applied for the purposes above specified "and for no other purpose." It would thus appear that the by-law does not specify any street for the railway, but leaves that to future selection by the council. The issue of debentures is made valid by the statute, and no objection is taken here as to the validity or sufficiency of the by-law otherwise, or to the right of the city to proceed with the construction and operation of the proposed lines. Objection is made, however, that the mere right to construct and even an authorized plan for construction does not suffice for the application now in question.

On the 5th of June, 1911, the city gave the company notice of the application out of which this appeal arises, and the application was heard on 21st June. No evidence was offered beyond putting in some letters which had passed between the parties, each inviting proposals from the other.

The permission of the Board for the construction had not been given when the application was heard. The information which the Board had required was received by it only on the previous day, 20th June, and the company's counsel was not aware that it had been furnished. The Board's approval is dated 23rd June. The order appealed from, though not dated, is stated to have been made on 24th June.

The city notified the company of its intention to apply to the Board for two things—an order to the company to afford all proper facilities for what may be called interchange of passenger traffic and cars between the company's street railway and two of the city's lines, namely, those on St. Clair avenue and Gerrard street; and an order that the company and its railway system shall be subject to and governed by the provisions of sec. 57 of the Ontario Railway Act, 1906. The Board did not grant the application for an order for interchange. It was hardly asked for, but recognized as premature, and indeed asserted by the city to be a matter

for subsequent action. But the Board did make an order declaring that sec. 57 shall apply to the company and its street railways, and also declaring that it should apply to the city corporation "and the street railways to be constructed by it." The later declaration had not been specifically asked for.

The company appeals on the ground that the Board had no jurisdiction to make such an order against it at the instance of the city or with a view to interchange with the non-existent city railways.

The Ontario Railway Act, 1906, 6 Edw. VII., ch. 30, in sec. 3, incorporates the Act with the special Act, and declares that it applies to "all persons, companies, railways (other than Government railways) and (when so expressed) to street railways within the legislative authority of the Ontario Legislature," but no section of the Act shall "apply to street railways unless it is so expressed and provided." Section 5 is to like effect.

Section 57 in sub-sec. 1 provides that "the directors of any railway company may at any time and from time to time make and enter into any agreement or arrangement with any other company either in this province or elsewhere for the regulation and interchange of traffic passing to and from the railways to the said companies, and for the working of the traffic over the said railways respectively, or for either of those objects" . . . "for any term not exceeding twenty-one years," and to provide for the appointment of a joint committee or committees for better carrying into effect such agreement or arrangement "subject to the consent of two-thirds of the shareholders voting in person or by proxy." Sub-section 2 provides that "every railway company" shall afford all reasonable facilities "to any other railway company," for the receiving and forwarding and delivering of traffic upon and from the several railways belonging to or worked by such companies respecting and for the return of carriages, trucks, and other vehicles," and no such company is to give any preference or advantage to any particular company or description of traffic, or subject any to prejudice or disadvantage, and "every railway company having or working a railway which forms part of a continuous line of railway, or which intersects any other railway, or which has a terminus, station, or wharf, of the one near a terminus, station or wharf of the other" shall afford facili-

ties for receiving and forwarding by the one of all the traffic arriving by the other and so that no obstruction may be offered" in the using of such railway as a continuous line of communication." Section 3 imposes penalties on the employees of a "railway company," for refusing or neglecting to receive, convey, or deliver traffic from the railway of "any other company." Section 4 declares that "in case any company or municipality interested is unable to agree as to the regulation and interchange of traffic, or in respect of any other matter in this section provided for, the same shall be determined by the Board," and sec. 5 reads "all complaints made under this section shall be heard and determined by the Board." If the section stopped there it would not apply to street railways. But sub-sec. 6 is added which declares this section shall apply to such street railways as may from time to time be determined by the Board."

The word "company" in the expressions "any railway company," "every railway company," and "any other railway company," used in sec. 57 is not, I think, governed by the interpretation given in sec. 2 to the expression "the company," and should therefore be interpreted in its natural sense, and would not include a municipal corporation. And as only companies are mentioned, it could not be intended that municipalities or their railways could be made subject to it. But then, it may be said, that under sec. 569 of the Municipal Act the municipality has the same rights, powers, and liabilities as street railways and companies (which must mean all, not some, of such railways and companies) under the Street Railway Act (R. S. O. 1897, ch. 208), which is now replaced and repealed by the Ontario Railway Act, 1906. By the Interpretation Act, R. S. O. 1897, ch. 1, sec. 8 (now 7 Edw. VII., ch. 2, sec. 7) the section of the Ontario Railway Act, 1906, corresponding to those of the Street Railway Act would be applicable. In the Street Railway Act and the amendments before 1906, there was no provision requiring interchange, though there was a right to agree to interchange. Section 57 apart from sub-sec. 6, does not relate to street railways at all, and even with sub-sec. 6 does not relate to all, but only to some street railways—perhaps to none in the province other than these two. It cannot then be said that sec. 569 makes interchange a right or liability of the municipality. The only view in which it might be claimed that the municipality would be made subject to sec. 57, is

that it is subject to the jurisdiction of the Board, and liable to have an order made by the Board under that section—but that is not, I think, in any sense one of the “liabilities” contemplated by sec. 569. I am, therefore, of opinion that a municipality is not liable under sec. 57, any more than a government railway to be compelled to interchange traffic with any street railway or other railway company. I may here add that the use of the word “municipality” in sub-sec. 4 does not help a contrary view; it is manifestly used in respect of rights other than as proprietors of a railway, and its use there as contradistinguished from company when it is not used elsewhere in the section rather supports the view that “company” does not include municipality.

It is noticeable that sub-sec. 6 of sec. 57, uses the words “street railways.” Street railways are defined in sec. 2, as meaning a railway “constructed and operated” along a highway as already mentioned. Had sub-sec. 6 used the words “the company” they are defined as meaning “the company or person” (which would under the Interpretation Act include corporation) “authorized by the special Act to construct.” The city’s street railway is authorized, but it is not yet commenced, much less, constructed or operated. But as the interchange of traffic could not take place till constructed and operated, I do not see that the Board must wait until that stage before making the declaration that sec. 57 shall apply to it, when constructed and operated. As pithily put by the Board “that the proposed civic lines will be built is as certain as taxes.” The Board do not make such a declaration in the dark. As appears from the quotation above made from their reasons, they know the routes and the gauge, and sufficient particulars to enable them to judge whether it is proper that a particular street railway should be made liable to interchange at all. The Legislature have constituted the Board for the very purpose of exercising its discretion, and it is not to be assumed that the Board would in any case act in the dark or without full information on all points necessary for arriving at a decision. The liability to interchange is one thing, the terms of the interchange another.

I have been dealing with the question of the power of the Board to determine that the city or its street railway shall be subject to sec. 57. That it has such power with regard to the street railway of the appellant company is not disputed. That power it may exercise of its own motion or

on the application of anyone interested, and under sec. 17 of the Ontario Railway and Municipal Board Act, it can decide conclusively who is a party interested, and I do not see anything in the Act to prevent the city corporation owning or not owning a street railway or a Board of Trade, or a body of merchants, or an individual from being considered by the Board to be a party interested sufficiently to set the Board in motion if the Board did not choose to take action itself.

We then come to consider the order appealed from. It is in fact two orders combined in one. It is not an order that sec. 57 shall apply as between these two street railways, or shall apply to each as regards the other. It contains an absolute and unlimited declaration that the section shall apply to the company and its street railway. And then it contains an equally absolute and unlimited declaration as to the city and the "street railways to be constructed by it." It is not restricted to those coterminous with the company's railway nor to those on St. Clair avenue and Gerrard street, nor even to those to be constructed under the existing by-law, but this appeal has no concern with any objection on that score. The effect is that if sec. 57 is to apply to the company it applies to it, not merely to require interchange with the city's railway, but with all street railways, if not all railways of any sort to which sec. 57 from time to time applies. That brings us again to consider sub-sec. 6. Several meanings may be put forward for it. One is that the Board may apply section 57 not to one or more specified street railways, but to a class or to such as answer certain requirements. This order would not comply with that interpretation. Another meaning might be argued for, that the Board could apply sec. 57, not to any one or more certain specified street railways, but only as between two or more specified street railways—so that in fact it would not wholly apply to any one of them, that is it would not apply to it as regards railways not mentioned. This order does not comply with that meaning.

Then the only remaining construction, and the one which is in my opinion the correct one, is that the Board may do what, if we could judge, only by the formal order it has done here, that is decide whether or not sec. 57 shall apply to a particular railway whatever the result may be.

If the Board chooses to do that with regard to the street railway of the appellant company, or any other company to

which the Ontario Railway Act applies, I do not see anything to prevent it. What the effect upon that company may be is another question. Does it become liable to interchange with all railways which are subject to sec. 57, or only with street railways? The section is to be construed not merely with reference to Toronto alone, but with reference to the whole province. There might well be places in which a street railway would be the only connecting link between two lines of steam railways, and in which it might be constructed with a view to being a connecting link, as street railways are not limited to carriage of passengers, and street railways continue to be street railways for a mile and a half outside the city or town. It might be to the public interest that such a street railway should be both entitled or liable to interchange with lines of steam railway.

In my opinion the Board cannot limit the application of sec. 57, if it declares that the section applies to the appellant street railway or any other. It cannot say how far that section shall apply or that it shall apply only to a limited extent or with regard to one railway or one street railway.

If two companies to which the section applies are subsequently unable to agree and the intervention of the Board becomes necessary, it may find interchange impracticable and decline to make an order between them, or may have to require conditions which would not be acceptable to an applicant. But that is a different matter from assuming to exercise under sub-sec. 6, the right to limit the application of the section.

Although the order appealed from in form purports to be separate applications of sec. 57 to each of these street railways, it is not stated just what view the members of the Board took of the meaning of the sub-section. But in their reasons they in every instance couple the two roads together. For instance it is stated "The application is made by the city against the Toronto Railway Company for the purpose of securing an interchange of traffic between the civic car lines and the company's street railway system, and with that view to have it declared that sec. 57 of the Ontario Railway Act of 1906 applies to the company and the city street railway We do not think we require to wait until the last spike is driven before determining that sec. 57 shall apply to the city's and the company's street railways. To do so would result in useless and wasteful dup-

lication . . . there should be an interchange of traffic, and, therefore, we make the determination asked for by the city." The Board also expressed its opinion that it would be in the public interest when the city had completed and equipped the railway to arrange for its operation with the present street railway as one system. Nowhere does the Board deal with the propriety of making sec. 57 applicable to any one road alone.

It is, I think, evident that although the city had only asked for the application of sec. 57 to the company's street railway, the Board was not considering the application of the section to either railway apart from the other—and were only making the declaration with respect to the company's railway because they were also making a similar declaration with regard to the city's railway. The reasons of the Board for its decision are signed by all the members, and are before this Court, and it is evident that if the city was not to be liable to interchange no order would have been made in respect of the company alone, and that the order was only made for the purpose of interchange between these two railways. Taking as I do the view that the Board could not apply sec. 57 to the city railway, it follows, I think that although the order with respect to the company's railway would, if it stood alone, be quite within the powers of the Board, yet being made upon a non-existent basis and with a view to an impossible result, and made without consideration of its effect upon the company with regard to any other railway or street railway, it was not warranted in law and should be declared invalid.

Whether in view of the provisions of sec. 21 of the Ontario Railway and Municipal Board Act, 1906 (6 Edw. VII., ch. 31), restricting the Board's power to interfere with a company's rights or duties under an agreement, any practical beneficial result would be attained by the application of sec. 57 of the Ontario Railway Act may give rise to serious consideration. The Board have a very desirable end in view, and it is to be hoped that the good sense and public spirit of both parties will lead them to it.

COURT OF APPEAL.

APRIL 15TH, 1912.

MERCHANTS BANK v. THOMPSON.

3 O. W. N. ; O. L. R. .

Promissory Note—Accommodation Maker—Liability of—Note given in Purchase of Interest in Partnership — Left with Bank for Collection—Expulsion of Maker from Partnership.

COURT OF APPEAL reversed judgment of Divisional Court. 18 O. W. R. 582, 23 O. L. R. 502, 2 O. W. N. 904 and restored judgment of BOYD, C., 16 O. W. R. 770; 1 O. W. N. 1015 with costs throughout. MACLAREN, J.A., *dissenting*.

An appeal by the plaintiffs from a judgment of a Divisional Court, 18 O. W. R. 582; 23 O. L. R. 502; 2 O. W. N. 904, reversing (BRITTON, J., *dissenting*), a judgment of HON. SIR JOHN BOYD, C., at the trial without a jury, 16 O. W. R. 770; 1 O. W. N. 1015.

The appeal to the Court of Appeal was heard by HON. SIR CHARLES MOSS, C.J.O., HON. MR. JUSTICE GARROW, HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MEREDITH, and HON. MR. JUSTICE MAGEE.

J. F. Orde, K.C., for the plaintiffs, appellants.

T. Lewis, K.C., and J. B. Bain, K.C., for the defendants, respondents.

HON. SIR CHARLES MOSS, C.J.O.:—The plaintiffs sue as the holders of promissory note for \$2,000 made by one A. H. Living and the defendants in favour of one C. H. Fox, and by him endorsed to the plaintiffs' order. The note is in form joint and several. The action was brought against the two defendants alone, and no steps were taken by them to bring or cause the plaintiffs to bring Living and Fox into the action.

They were, of course, not bound to do so unless they considered it material to their defence, but in one aspect of the case it might have been to their advantage to have had them before the Court.

The defences relied upon as shewn by the record upon which the parties went to trial as well as those afterwards permitted to be set up, are set forth on p. 508 of the report.

As regards the answers to the action alleged in the first paragraph of the original defence and repeated in substance in two paragraphs of the further defences, viz., an agree-

ment for extension of time and neglect to give notice of dishonour to the defendants there is no difference of opinion between the trial Judge and the Divisional Court. These defences failed for lack of proof that the plaintiffs had notice that the defendants were sureties for Living.

The other defences, viz., that the note was made without consideration and was endorsed to the plaintiffs without consideration and after maturity; that the consideration for the note as between Fox and Living failed, and that at the time of the commencement of the action the plaintiffs' title was no higher than Fox's, and the note was held subject to the existing equities between him and Living, are those upon which the differences of opinion have arisen. It is now beyond question upon the evidence that the defendants became parties to the note as sureties for Living upon a transaction between him and Fox for the acquisition by the former of a half share or interest in the business of manufacturers agent carried on by Fox in the city of Vancouver, and the formation of a partnership between them in the business. The nature of the transaction is to be gathered from the evidence of these parties and the memorandum of agreement signed by them. In effect it was not the unusual transaction of a person purchasing his way into an established business paying a bonus or premium to the owner and entering into partnership with him upon terms arranged between them.

The bonus or premium to be paid was \$2,000, but as Living was unable to provide the money and Fox was willing to accept the promissory note of the defendants, Living prevailed upon them to join him in the note in question. It is dated July 1st, 1907, payable 3 months after date, and therefore, fell due and payable on October 4th, 1907. It was received by the plaintiffs from Fox on September 12th, 1907, and has been in their possession ever since.

At the time when the note was received the plaintiffs had under discount a note for \$500 made by Fox, dated September 4th, payable in 30 days, but beyond this he was not indebted to the plaintiffs.

There is upon the testimony a far from satisfactory account of the terms or conditions under which the note was left with the plaintiffs. Fox was positive that it was left for collateral and collection. The plaintiffs' manager would not use the term "collateral." He said it was left "for what it was worth," and the records shew that it was entered in

the collection and not in the collateral register. The learned Chancellor found as a fact that it was left as collateral security and also for collection, while in the Divisional Court the learned Chief Justice said that notwithstanding Fox's evidence the impression made upon him was that the note was endorsed to the plaintiffs merely for collection and not as collateral. The conclusion I have reached upon the question of consideration renders it unnecessary to finally decide between these conflicting views, but on the whole I incline to the latter. Even so in my view it still leaves the plaintiffs entitled to the judgment awarded to them by the Chancellor.

As endorsees for collection of the note they were entitled to a lien on it for debts that were then presently payable and from time to time thereafter becoming payable. The claim now made is in respect of an indebtedness of Fox which became payable from and after the 24th of November, 1908. Prior to that date there was a period in which Fox was free from direct indebtedness, although there were some outstanding notes or drafts under discount; a time during which, according to the plaintiffs' manager, Fox was at liberty to take the note out of the plaintiffs' possession had he chosen. But Fox did not take it away and it remained with the plaintiffs until the debts now due and payable had accrued. And unless something had occurred between Fox and Living prior to the 24th of November which furnished the latter with a defence to an action on the note the plaintiffs are entitled as holders to a lien for the amount of Fox's indebtedness to them.

The defence set up is want of consideration and total failure of consideration. Upon the evidence it seems to me to be plain that there was good consideration for the note when it was given. Living obtained an interest in Fox's agency business which he then had and which he might thereafter acquire and became a partner on equal terms with Fox. He was and acted as a partner for at least 15 months during which time he says he earned or became entitled to several thousand dollars as profits and actually received about \$1,000 for his own use. He was known to at least some of the customers or persons with whom or on whose behalf he and Fox executed commissions, and drafts in the firm name had been drawn upon some of them. Upon the facts it would be impossible for Fox to deny that Living was a co-partner or to legally refuse him his rights as such.

Neither could Living be heard to say as against persons dealing with the firm that he was not a partner. When, therefore, the note was received by the plaintiffs it was a note for good consideration not overdue.

But then it is said that a failure of consideration accrued by reason of what took place between Fox and Living in July, 1908, when Living left the firm's place of business. What occurred at that time could have no greater effect than a dissolution of the partnership. If as Living seems to think it was a wrongful expulsion that could not alter his right to be restored or if the conditions appeared to be such as to render impossible a continuance of the partnership to a judgment for dissolution upon such terms as the circumstances justified. Whether Living considered that a dissolution was effected by what occurred or considered that he was wrongfully expelled he seems to have acquiesced and to have taken no steps either to be restored or to procure a taking of the partnership accounts.

The circumstance that Living paid or was paying a premium or bonus could make no difference in this case where there was no stipulation or agreement as to the time of the duration of the partnership.

Whether through oversight or inadvertence there was no agreement that the partnership should continue for a specified time or definite period. But the partnership was in fact created; and that being so, its subsequent termination would not create a total failure of consideration so as to affect its validity in the hands of either. Fox or the plaintiffs; although upon taking the partnership accounts Living might be able to shew himself entitled to a return of part of the premium. The question is discussed at length in Lindley on Partnership, 7th ed., p. 625, et seq. At page 626 it is said "In the first place assuming the partnership to have been in fact created it is clear that there has not been a total failure of consideration for the premium, and consequently it cannot be recovered as money paid for a consideration which has failed. In the next place persons who enter into partnership know that it may be determined at any time by death or other events; and unless they provide against such contingencies they may fairly be considered as content to take the chance of their happening, and the tendency of modern decisions is to act on this principle." It does not necessarily follow that no part of the premium is to be re-

turned in any case. On the contrary it appears from many authorities, that in cases where the dissolution was not brought about by wrongful conduct on the part of the partner who paid the premium or under circumstances for which he is responsible a return of part may be awarded. But as to what part, the learned author says (p. 680): "There is no definite rule for deciding in any particular case the amount which ought to be returned" and instances are given of the circumstances which are to be taken into consideration.

The defendants' difficulty in this case is that they have not shewn the circumstances attending the dissolution sufficiently to enable a decision to be given as to whether Living is entitled to a return of part of the premium. There are charges and counter-charges of misconduct on the part of Fox and Living, but they are not before the Court, and it was for the defendants if they desired to avail themselves of the defence of partial failure to have put the case in proper train for enquiry. Neither is there material upon which can be ascertained what if any proportion of the premium should be returned, nothing to reduce the amount of the indebtedness as represented by the note. The burden of shewing this was on the defendants, and it was not for the plaintiffs to shew the state of the accounts. Payments either by reduction of the amount of the premium or receipt by Fox of profits of the business were to be proved by the defendants and they failed to shew either.

The appeal should be allowed and the judgment at the trial restored with costs of the appeal to the Divisional Court and this Court.

HON. MR. JUSTICE GARROW and HON. MR. JUSTICE MAGEE, concurred.

HON. MR. JUSTICE MEREDITH:—The first question involved in this case is one of fact, namely: What was the nature and effect of the transaction between the bank and Fox by which the bank became the holders of the promissory note in question, of which he was the payee, by virtue of the endorsement of it by him over to its order, and the delivery of it at the same time, by him to it.

We are, of course, not bound by the present impressions, of either of the parties to that transfer, as to its true nature and effect; memory at best is likely to be more or less treacherous, and none the less because one of the persons was the

manager of a bank upon whose mind impressions of banking transactions were being continuously made in large numbers. In such a case as this the surrounding circumstances and the probabilities are very useful witnesses.

Fox was a customer of the bank, and a man whose business affairs, or other exigencies, made it necessary or expedient for him to borrow money from time to time, and the note in question was, at least, likely to be helpful, and to be used in obtaining the necessary credit, in such an institution as this bank—one of the several foremost in this country.

There are really only three purposes for which it is possible that the transfer of the note could have taken place: (1) for safe keeping; (2) as security for money advanced or to be advanced; or (3) for collection.

Safe keeping—mere custody—is out of the question: no one suggests it; it ought not to have been endorsed over if that were the intention of the parties.

Collection alone seems to me to be also out of the question; no one testifies to it; and no one, having regard to all the circumstances of the case, could reasonably conclude that such was the full nature and effect of the transaction. It was the note of the man's partner transferred while they were carrying on business together, many months before the rupture between them: it was not a note of the ordinary mercantile character usually paid and taken up through the payee's banker. What reason can be suggested for placing the promissory note of one's partner in a bank for collection: this partner was the principal debtor and he was at hand; if it be suggested that the payee knew or expected that the partner would resist payment then it is almost certain that it would be transferred so as to give the bank higher rights than the payee.

The testimony of the bank's manager is that the note was taken by the bank, through him for what it was worth; that is, of course, for what it was worth in Fox's dealings with the bank and his obligations to the bank in connection with them, not for the small commission to be had for collection, if it were paid at maturity. The testimony of Fox at the trial was that the purpose of the transaction was that the bank should hold the note as collateral security for moneys advanced to him from time to time; and he added "from drafts going through;" words which do not seem to me to have been intended to put any expressed limitation upon the extent of the security, but rather to indicate that which was in

the mind of the witness at the moment of making the statement; and was his way of expressing the character of the business which he did with the bank and for which they would need security; strictly speaking, they must have meant more than they literally convey. No security would be needed for drafts going through for collection; security would be needed only for money advanced whether on "paper" strictly called drafts or not.

It is quite obvious that if the manager had regard for his master's interests, or for his own reputation as a banker, he would have taken the note as security for such sum as might from time to time be advanced by the bank to Fox, especially as there can be no manner of doubt that Fox was quite willing that the bank should so acquire and hold it; that is that it should be held as security for the amount of Fox's indebtedness to the bank from time to time in his account with them. If we draw the conclusion, from circumstances fully warranting it, that the banker would take all the security he could get, and would try to get more, we shall be very much nearer the truth in almost, if not quite, every case, than if, from the same circumstances, we conclude that he would reject security which he might as easily have had and would reject it without rhyme or reason.

So that we have a customer, hungry for credit on the best terms obtainable, with a negotiable instrument by which he can get more credit and better terms if he pledge it as a standing security; and a banker always hungry of every available security; and so you might as well expect two hungry men to put aside, instead of eating, good food set before them to be eaten, as to expect this note under the circumstances to be laid aside for collection only: I accept Fox's statement as to the purpose of the transfer of it without any sort of doubt.

There is really nothing, that militates against this view of this case, in any of the circumstances relied upon by the respondent; it was quite right in any case to enter the note in the bank's collection docket: why not? It was in the bank's interests, and no doubt their duty, to send it through the regular process for collection. It was not discounted; the proper course of the bank seems to me to have been taken in taking the usual steps to enable the makers to pay at maturity; and would have been taken in placing the proceeds of the note to the credit of Fox's account, if it had been paid.

If for collection only, it would be odd that for many weeks after it became payable no steps of any kind were taken respecting it; remaining as it did is, of course, that which was entirely right if it were a subsisting security. And, beside all this, as I have before mentioned, if there were any likelihood of the defences which are now being set up, it would have been better for Fox that the bank should become and remain throughout holders for value, unaffected by any equity in respect of it, to the extent of his indebtedness to it.

The fact that no "hypothecation paper" was taken with it has little if any weight. It was a single note and the course of business of the bank in that respect, at the branch where the transaction took place, is testified by the manager to have been as follows, in this respect:—

"Q. And you took a hypothecation, I suppose, at the time? A. No.

Q. Isn't that usual when notes are left at a bank, except when they are left for mere safe keeping? A. It is more regular. Sometimes one way and sometimes the other."

And I cannot think that the testimony of the bank manager warrants any such conclusion as that Fox might have taken up this note at any time when he was under any liability to the bank; he could, of course, have taken it up at any time when no such obligation existed; but, of course, at the risk of not getting credit when he next sought it.

If Fox were making, and if in law he could make an appropriation of the proceeds of the note to the payment of the balance of his account by the bank, on the grounds that the bank never acquired or held the note in this way, would he be likely to succeed? We must not let sympathy for the man who made the note, and got others to join with him as makers, and who plainly has not come very well out of his co-partnership experience with Fox, affect the strict legal rights of the parties. If it may be said, to the bank, why did you not take a writing evidencing the fact, if it were a fact that you were to hold the note as your continuing security, might it not, with much greater force, be said to Fox, why did you not take a receipt for the note shewing it was transferred for collection only; and why not take the note up, or do something in regard to it, after failure of the makers to pay.

The disinclination of the bank to have the note sued on in its name does not help the respondent; if they were col-

lectors merely in the sense of a collecting agency, they would be less likely to have such a disinclination. Such a disinclination is natural in any case, and the more so at the instance of another and for his benefit; but in this case the bank had been driven to sue in its own interests now.

My conclusion upon the first question involved is, that the note was taken and always held by the bank as security for the repayment of all that might from time to time be owing by Fox to the Bank; see *Atwood v. Crowdie*, 1 Stark. 483.

If I am right as to the facts, there can be no doubt that the note is good, in the bank's hands, against the makers of it, for the amount of the indebtedness of Fox to the bank, for which judgment was entered in favour of the bank at the trial; the fact that at some time there was nothing due from Fox to the bank would not cut out that right or deprive the bank of the position of a holders in due course; there would not be by implication a new transfer of the note as security for each separate indebtedness or advance, there would be but the one transaction, to which all changes in the account between Fox and the bank would be referable; everything would relate back to the one transfer made while the note was current; although, of course, it was quite competent in Fox to have taken up the note at any time when there was no obligation on his part to the bank: see *Atwood v. Crowdie*, 1 Stark. 483, a case extremely like this case in substance.

I would allow the appeal and restore the judgment to the extent of the amount of the plaintiffs' claim proved at the trial.

HON. MR. JUSTICE MACLAREN (*dissenting*):—This action was brought by the bank against two of the three makers of a joint and several promissory note for \$2,000 to the order of one C. H. Fox, who endorsed it over to the bank before maturity. It was not protested and has not been paid. The action was tried by Boyd, C., who held that under sec. 54, sub-sec. 2, of the Bills of Exchange Act, the bank was entitled to recover against the makers, the sum of \$1,116.39 being the amount of its lien for the indebtedness of Fox. The defendants having appealed to the Divisional Court, the judgment was reversed and the action dismissed on the ground that the bank was not a holder in due course, but acquired its lien after maturity and dishonour, and after a total failure of consideration. Britton, J., dissented.

The note in question was given under the following agreement: "I agree to buy one-half interest in the Manufacturers Agency of Mr. Chas. Fox, in the city of Vancouver; to have one-half interest in all agencies controlled by him and any agencies which he shall secure: Mr. Fox to have one-half interest in all agencies which I shall secure—for the sum of two thousand dollars (\$2,000).

That Mr. Fox and myself to each put into the business the sum of one thousand dollars (\$1,000).

That I shall work my way to Montreal, returning to Vancouver as soon as possible.

Mr. Fox and myself to each draw a stated salary agreeable to each other.

Balance of commissions, after salary and general expense accounts are deducted to be equally divided.

Dated at Vancouver in the province of British Columbia, this 19th day of March, 1907—(Sgd.) C. H. Fox. (Sgd.) Alf. H. Living." The same day Fox gave Living the following letter:—Vancouver, Canada, March 19th, 1907—Mr. A. Living, Dear Sir: Confirming our agreement of to-day it was understood that I will at my own expense take a trip to England and Germany during the next year to secure better agencies, particularly cutlery, household furnishings and fire-arms. Yours truly, C. H. Fox."

Living had not the \$2,000 to pay Fox, but after getting a note that was not satisfactory and was returned, he finally persuaded the two defendants, his uncle Thompson, and his mother-in-law Mrs. Turley, both of Ottawa, to join him in a joint and several note dated Vancouver, July 1st, 1907, for \$2,000 payable in three months after date to the order of Fox.

Early in August Fox tried to discount this note at the Merchants Bank, Vancouver, but after enquiry the manager, Harrison, declined to discount it. Fox took it away, but on September 12th, 1907, he brought it back and left it with the manager. There is a question as to the terms on which it was left, which will be considered presently.

The defendants urged in the Courts below and before us that Fox, when he was the legal holder of the note after maturity had given time to Living who was his only debtor, the defendants being merely sureties, and that on this account the defendants were released. It was held by both Courts that this defence was not proved, and I am of opinion that they were clearly right.

It was also argued before us that as the defendants were mere accommodation makers, the bank could not after maturity and dishonour acquire a good title to the note as against the sureties, and that they were released by not being notified of the dishonour. Being makers they were not entitled to notice, and the mere fact of their being accommodation makers was not alone sufficient to prevent the bank acquiring a good title after maturity for value, as this is not an equity attaching to a note. See Chalmers on Bills (7th ed.), p. 130; 1 Daniel on Negotiable Instruments, sec. 726; *Sturtevant v. Ford*, 4 M. & G. 101. When we come to deal with the main question we find the situation a very unsatisfactory one, as the business between Fox and Living was done in the most slipshod and irregular manner, as were also the dealings between Fox and the bank with respect to the note in question. Neither Fox nor Living was made a defendant in the present action; but they were both witnesses at the trial, and wherein they differ in their testimony the Chancellor does not express any preference. Harrison, the manager of the bank, who personally made the arrangements with Fox regarding the note, was not at the trial, he having been previously examined at Vancouver under a commission; so that as regard his testimony we are in the same position as was the Chancellor. Where his testimony conflicts with that of Fox I prefer to accept his version of the facts, especially as he is corroborated by the books and by the entries and records made at the time. As to the terms on which Fox left the note with him, Harrison simply says "he left it with me for what it was worth."

From the evidence of Harrison it appears that on the 4th of September, 1907, he had discounted for Fox a \$500 note which was current on the 12th of September when the note now sued on was left with him at the bank. He also discounted another note for \$300 for Fox on the 29th of September, 1907. From this time onward until November 25th, 1908, Fox was from time to time indebted to the bank in varying amounts, and at times, sometimes for weeks at a time, he was free from such indebtedness. From November 25th, 1908, until this action was brought on the 2nd of March, 1909, he was indebted continuously. Harrison's evidence as to the position of the note during these periods is given as follows: "Q. And at any time during this period, when Fox was indebted to the bank he could have taken the note out of your possession and done whatever he chose with it? A. Yes, had he chosen." As a banker, he knew that

this correctly described the position of the bank with respect to a note left with it by a customer as he says this one was simply "for what it was worth," and without any special pledging or hypothecation, and the rights which it had under the banker's lien, whereby it has the right to retain any such note for any debt due to it; but has not the right to retain it for any liability which has not yet become due or payable. See Grant on Banking (2nd ed.), p. 306; 1 Halsbury's Laws of England, sec. 1258.

It was urged on behalf of the bank, on the authority of *Atwood v. Crowdie*, 1 Stark. 483, that although there was no lien when there was nothing due, yet on the \$450 note becoming due on the 25th of November, 1908, the lien of the bank would revive as of the 12th of September, 1907, the date of the original delivery of the note to the bank.

Such is not the effect of *Atwood v. Crowdie*. Lord Ellenborough's holding was not what is claimed, but was that the lien on the accommodation bills having ceased to attach when the debt was paid "by allowing them to remain in the hands of the plaintiffs, the lien revested, when upon fresh advances made, the balance turned in favour of the plaintiffs." What the case really decided was that the lien would revive as of the date of the fresh advances, and that a party might acquire a lien on accommodation bills after their maturity. This case so far as it is in point is entirely in favour of the defendants, as it would shew that the bank is in the position of any other holder taking a bill after maturity—it takes it subject to its equities. The legal position of the bank in this case is the same as though it had returned the note to Fox when there was nothing owing by him, and he had re-delivered it to the bank when he again became indebted to it on the 25th of November.

The next question is whether there was such a failure of consideration as between Fox and Living as would prevent the bank from recovering as was held by the Divisional Court. In order to decide as to this we have to look at their agreement of March 19th, 1907, set out above, and to consider their relations and the dealings between them in so far as they may affect this note up to the 25th of November, 1908.

A glance at the agreement will shew how crudely and inartificially it is drawn; and a perusal of the agreement and the evidence will shew how completely each of the parties appears to have failed in almost every particular to

carry out the terms and stipulations binding upon them respectively.

The evidence shews that Fox never made over or gave to Living the one-half or any other interest in any of the agencies he then had or secured afterwards, and that Living never gave him the \$2,000 or any part of it; that neither of them paid in any part of the \$1,000 which they were each to contribute as capital; that Fox kept sole control of the business premises, his own name alone appearing on the sign; that no partnership books were ever opened or kept; that the bank account remained in the name of Fox individually; and that he did not go to England or Germany as he undertook to do in order to secure better agencies. The nearest approach to anything like a partnership appears to have been their getting a few months after the agreement some stationery with the name of "Fox and Living" upon it. Fox says this was used for some of their correspondence which Living denies. Their proposed partnership amounted to so little that when they quarrelled and Fox put Living out, all the latter had to do was to pick up a few private letters off the desk and walk out. Up to the time of the trial (nearly two years) neither of them had taken any further steps to settle up their business. The only question, however, with which we have to deal at present is that of the consideration or the failure of consideration for the note. This was the \$2,000 which Living was under the first paragraph of the agreement, to pay Fox for one-half interest in all the agencies then controlled by Fox, and in any he might thereafter secure, possibly including his undertaking to go to England and Germany at his own expense, no part of which was carried out by Fox, so that there was a total failure of consideration. This being a defect of title within the meaning of sec. 70 of the Bills of Exchange Act, or equity attaching to the note, and existing before and at the time that the lien upon which the bank sued had its origin which was long after the maturity of the note, the bank could acquire no better title than Fox then had and the note was void for want of consideration.

If the parties were going into matters beyond this it could only be done as the learned Chancellor suggested in proceedings to which Fox and Living were parties.

For these reasons and others given by Falconbridge, C.J., I am of opinion that the judgment of the Divisional Court was right and should be affirmed.

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YORK COUNTY COURT.

APRIL 18TH, 1912.

PATON v. PRICE.

Principal and Agent—Commission on Sale of Land—Parties brought together by Agent—Sale Effected by Principal without Agent's Knowledge—Right of Agent to Commission.

DENTON, Co.C.J., gave plaintiffs judgment for their commission. *Rice v. Galbraith*, 21 O. W. R. 571, followed.

An action by real estate agents to recover a commission on the sale of land.

W. E. Raney, K.C., for the plaintiffs.

R. G. Hunter, for the defendant Price.

John King, K.C., for the defendant Warren.

D. I. Grant, for the defendant Partridge.

HIS HONOUR JUDGE DENTON:—The plaintiffs are real estate agents in Toronto. Prior to 26th April, 1911, the defendant, Price, was the owner of stores numbers 359, 361, 363, and 365½ Spadina avenue, Toronto. In one of these stores the plaintiffs had their office rented from Price. Some two years before the said date, the defendant Price placed these stores in the hands of the plaintiffs for sale on the usual commission terms. The defendant Partridge is also a real estate agent in Toronto. The defendant Warren is a dealer in knitted goods, and at the time mentioned had his place of business at 465 Yonge street. The defendant Warren had been for sometime looking out for another place, and the defendant Partridge was acting as agent in endeavouring to secure a place for him. In connection with one of the properties which Partridge proposed to get for

Warren, Warren had paid Partridge money which Partridge had in his possession. The defendant Price had also authorized Partridge to sell the same stores.

On the morning of the 26th of April, Stewart, an agent of the plaintiffs, called upon Warren and mentioned these stores as being likely to suit him, and after pointing out the advantages of the property asked him to go to see them. Stewart told him that the plaintiffs had their office in one of these stores and to call there and the plaintiffs would shew him through. Later in the morning Warren called at the plaintiffs' office, and was shewn through the stores by the plaintiff Linton. Linton then tried to get Warren into their offices to make an offer. This Warren refused to do, giving as a reason that he wanted his wife to see the property. Warren went back to his own place and shortly after and on the same day the defendant Partridge called upon Warren to discuss the purchase of another property. Warren mentioned to Partridge that Stewart had been in, and that he had been over to see these stores. Partridge then stated to Warren that he also had had these stores on his books for sale for the past two years and could put the sale through for him. Warren readily concurred because Partridge had been interesting himself on Warren's behalf for some time, and had some money in his possession belonging to Warren.

Partridge said he would see Price at once, which he did, and after representing to Price that he had a purchaser at \$22,000, which figure Price refused to discuss, he prepared what is called an option, which Price signed. This option was in the form of a bond that Price would sell the property to Partridge for \$23,000, and would pay him a commission of 2½ per cent.

Price well know that Partridge was an agent, and he must have known this option was obtained from him for the purpose of tying him up for a short time until Partridge could put through the sale. Partridge then returned to Warren and on the same day obtained from Warren an offer in writing by Warren to Price to buy the property for \$23 000. This offer Price accepted on the same day. This offer states that the sale is made through the Business Alliance, which is the name under which Partridge carried on business. There was some evidence that several weeks before the 26th April, the defendant Partridge casually mentioned these stores to the

defendant Warren, but this did not excite any interest in Warren, who did nothing in consequence.

I think it is beyond question that it was the action of Stewart in introducing this property to Warren, followed immediately, as it was, by his being shewn through the stores by the plaintiff Linton, that kindled the desire in the defendant Warren's mind to buy the property. This was what induced him to buy. It was the foundation upon which all subsequent negotiations proceeded and without which they would not have proceeded. And it is clear that what the defendant Partridge did was to snatch the transaction out of the plaintiffs' hands for the purpose of earning the commission for himself. No other conclusion can I think be come to on this evidence.

The plaintiffs first brought an action in this Court against Price alone to recover their commission. This action, for some reason that has not been explained, was discontinued, and the present action brought, alleging in effect a conspiracy on the part of the three to deprive the plaintiffs of their commission.

The plaintiffs at the trial asked for an amendment of the pleadings to make it clear that they claimed against the defendant Price for the commission. I allow this amendment. The plaintiffs' counsel was not able to state what cause of action he had against the other two defendants, and did not press for judgment against them. The defendant Price did not ask leave to amend the pleadings by claiming any remedy over against his co-defendant Partridge, so that the action has to be disposed of on pleadings in which the plaintiffs claim the commission from the defendant Price, and allege in a very hazy way a conspiracy on the part of the other two. There is no doubt, I think, on this evidence that the defendant Price entered into the contract of sale to Warren without any notice or knowledge that any one else than the defendant Partridge was interested in the matter as agent. In other words Price did not know that the plaintiffs had introduced the property to Warren. It does appear, however, that before the deed was registered the defendant Price was notified that the plaintiffs claimed the commission. The deposit of \$500 on the sale was paid to Partridge, which he kept and applied on his commission, and when the sale was completed the \$500 was credited to the purchaser as a payment on account of the purchase-money. The

commission amounts to \$575, but Partridge has not yet been paid the remaining \$75.

The main discussion at the trial was over the question whether, assuming that the plaintiffs had introduced the property to Warren, and that they were the effective cause of the sale, the defendant Price could be liable in a case like this, where he sold the property through the hands of another agent, being innocent of the fact that the plaintiffs were in any way concerned in the sale.

The very same point arose in the action of *Rice v. Galbraith* tried before me at the December, 1911, sitting of this Court. In that case I followed a decision in Manitoba of *Locators v. Clough*, 17 Man. L. R. 659, and dismissed the action. The plaintiff appealed and judgment in this case has been withheld until the judgment of the Divisional Court in that case should be rendered. That has now been done, and the case is reported in 21 O. W. R. 571. It has been held that the Manitoba case does not contain a correct statement of the law. Under *Rice v. Galbraith*, I have no alternative but to give judgment for the plaintiffs for the full amount of the commission, \$585, and the costs of the action. This may be a hardship upon the defendant Price, but no other decision can be given in view of the result of that case.

The action must be dismissed as against the other two defendants, and the only argument which took place at the trial as regards them, was the question whether they were entitled to their costs. This action should, of course, never have been brought against them. The plaintiffs' object may have been to get discovery, and it may be said that a plaintiff who brings, for the purpose only of getting discovery, an action against persons against whom he knows he cannot succeed, ought to pay in the shape of costs for any advantage he gets. But this case is such a glaring one of an effort to deprive the plaintiffs of a commission justly earned by them, that I think these two defendants cannot well complain if, in the exercise of my discretion, I dismiss the action as against them without costs. There will be the usual stay for thirty days.

DIVISIONAL COURT.

APRIL 18TH, 1912.

UNDERWOOD v. COX.

3 O. W. N.

Contract—Settlement of Claims under Will—Action to Enforce — Defence, Fraud and Misrepresentation—Absence of Independent Advice—Confidential Relationship—Documents Signed without Being Read Over.

DIVISIONAL COURT reversed judgment of KELLY, J., 21 O. W. R. 472, and dismissed plaintiff's action with costs. The action was brought by two children of the late Francis Underwood, to recover from defendant, another child, \$964.70 under an agreement entered into between the parties in settlement of a dispute over the said will.

Held, that the evidence disclosed that the alleged settlement was a nefarious transaction, though its real import was obscured at the trial by reason of the rejection of evidence. That the letter written by the plaintiff to the defendant *pendente lite* shewed to what unworthy means plaintiff would stoop to secure his own ends. Plaintiff had no belief in his flimsy claims upon his father or upon his estate or in respect to the validity of the will; his whole action indicated a scheme to put money in his pocket (by hook or by crook) at the expense of his sister.

An appeal by the defendant from a judgment of HON. MR. JUSTICE KELLY, 21 O. W. R. 472.

The appeal to Divisional Court was heard by HON. SIR JOHN BOYD, C., HON. MR. JUSTICE LATCHFORD, and HON. MR. JUSTICE MIDDLETON.

G. Waldron, for the defendant, appellant.

R. U. McPherson, and J. W. McCullough, for the plaintiffs, respondents.

HON. SIR JOHN BOYD, C.:—This appears to be a nefarious transaction, though its real import was obscured at the trial by reason of the rejection of evidence. Had the letter written by the plaintiff to the defendant *pendente lite* been admitted and considered by the learned Judge, I do not doubt but that he would have arrived at a conclusion diametrically opposite to that now under appeal. He was impressed favourably with the appearance of the plaintiff, but his own letter shews to what unworthy means he will stoop to serve his own ends. The dispute falls to be decided (as I take it), mainly, if not entirely on what occurred during the first interview of one hour between brother and sister (the said parties) on

the 4th May, 1910, when he made the claim which was afterwards given legal effect to by the writing under seal which is the foundation of this suit. But to understand the situation it is needful to refer to what is in evidence and to the prior sequence of events.

The first section relates to the plaintiff's claim of unfair treatment by his father. This claim, vague at best, looms up more largely at the trial than elsewhere made known. It was not known by or disclosed to the defendant, and even now it is difficult to find out coherently any claim from the evidence. But so far as it has substance the situation is this and it rests entirely on the recollection and good faith and credibility of the plaintiff—with no scrap of writing to assist, but all the writings making against him.

The lot named in the will N., part of lot 18 (fifty acres) in the 4th of Scarborough was the plaintiff says originally owned by his mother. She died in 1885, without a will, leaving the father, this son, and four sisters, of whom the youngest, the defendant Jane, was under age. It is said that the mother intended that the son should get this lot, and it is said that the father got the sisters to sign off their claims without consideration in favour of the plaintiff. It is said that the plaintiff mortgaged for \$500 with which money he went into business, without much success apparently. Then the father asked the son to sell him the lot, and the son wanted for his interest therein \$3,500, but the father would give no more than \$2,000, and this the son took on the father saying that the son would get a share with the rest of them when he divided—this being taken to mean, "when he died." The son contradicts himself as to whether the father paid \$2,000 and assumed the mortgage for \$500 or whether the mortgage was to be paid out of the \$2,000. This occurred in 1888. This manner of claim was not explained to the sister when the alleged settlement took place in 1910. He gives it in his evidence in chief thus: "I said I felt I had not got from the estate what I should have got, that my father had not left me what I was promised, what I felt I should have; she said she had nothing to do with that part of it as to what I got or should have got."

"Then I asked her in view of the circumstances, her knowing how the property was made and got together, and how I stayed at home till I was 23, I felt it was due her to make good the money, as she was evidently the only benefi-

ciary under the will, that I should have a certain amount and that Mary Ann and Catharine should have something."

To follow the history of this lot after the son conveyed to the father. In 1902, the father called upon Mr. Holmes to draw the papers conveying this lot to his daughter Jane and her husband Walter Cox and to draw a mortgage on 26th July, 1902, for \$1,000 upon the lot from the Coxes payable to the father at the end of 14 years with interest at $2\frac{1}{2}$ per cent. This was subject to a first mortgage from the father to George Morgan (probably an executor) for \$1,500. Mr. Holmes says that the mortgage was drawn expressly for the purpose of being left to the child (Ida Frances). According to the statement of the plaintiff this farm was worth about \$5,000, and they were to give \$4,750 for it; of which \$1,500 was paid by the defendant. There was also the mortgage for \$1,000, and if it was subject to another mortgage for \$1,500; that would total \$4,000. And the plaintiff omits to tell that his sister Jane relinquished her share in the lot originally when it was conveyed to the plaintiff—worth several hundred dollars. The rest of the sisters got \$2,500 each from the father during his life.

The next section relates to the will of the father.

The father died at the home of the plaintiff Catharine Laurie on 27th March, 1910. His will was made 2nd August, 1902, pursuant to instructions given to the well-known lawyer Mr. Holmes, who drew it and was one of the subscribing witnesses. He gives to his daughter Mary Ann Cox and her husband Arthur, N. $\frac{1}{2}$ of lot 19 4th Scarboro being 100 acres.

To his daughter Fanny Newell, a small lot containing $\frac{1}{8}$ of an acre alongside N. 50 acres of lot 18 conveyed to Jane and her husband. To Frances Cox daughter of his daughter Jane he gives the organ and also the mortgage for \$1,000 made by his daughter Jane to the testator and drawn less than a week before the will.

Nothing is given to his son Richard and daughter Catharine, as he had advanced them a sufficient portion (the plaintiff's name is not mentioned), and the residue of the estate goes to Jane Cox.

There was a codicil to this drawn after it because of the death of Fanny Newell on 1st March, 1905, when the testator was living with his daughter Catharine, whereby the small lot of $\frac{1}{8}$ acreage was given to his daughter Jane, the

defendant. This will was drawn by Mr. Holmes' partner Mr. Gregory and by him also witnessed. The defendant was too ill to attend the funeral, but the plaintiff was there, and then found out from the Lauries that a will had been made. The matter was talked over with the sister Catharine, and they were disturbed about the way the property was left, and about Ida, the little girl, getting the mortgage for \$1,000.

The plaintiff bespoke a copy of the will and returned to his home at London. He writes a letter 24th April, 1910, to the executor Geo. Morgan, urging the forthcoming of a copy of the will, in which he says: "All the information I have is from the Lauries, to the effect the youngest girl (i.e., defendant), in the family and her daughter comes in for the entire estate. And it is my opinion (sic) to go thoroughly into the matter before allowing the matter to be settled."

The plaintiff repairs to Mr. Beattie, solicitor, in London, and procures the filing of a caveat on 26th April, 1910, on behalf of the plaintiff and the two sisters Mary and Catharine. It is not clear what he told this solicitor as to the grounds of attack. He says: "One of the grounds was his own promise before a witness, that I was to have a share in the estate," and there is further from examination for discovery: "And your solicitor did not think that would be a ground for setting aside the will? A. I do not think I asked him that." "I thought possibly that would be a ground for setting aside the will . . . I did not go into the question of my reasons for the caveat to Jane." "However the caveat does set forth as grounds that the alleged will was not executed by the testator, or if executed it was so by means of duress and undue influence exercised over him, and that he was not of sound mind, memory, and understanding." The plaintiff says the caveat was filed because "he felt that he had not got what he felt was just out of the estate."

A warning was given on behalf of the executors on 27th April, that the contestant was to appear within ten days after service, failing which the Court would proceed in the premises; that would allow him till the end of the first week in May to act. Accordingly on 3rd May he visited Mr. Gregory, solicitor for executors, and the caveat was discussed and the will, and he asked information, speaking something of the father and saying the will was not fair. Mr. Gregory informed him that there was no doubt about the validity of

the will or codicil or of the capacity of the testator. He and his partner Mr. Holmes had known the testator well for years and the plaintiff admits that he was told emphatically that there was no cause for breaking the will.

The plaintiff had visited his father in 1909, and found him robust and strong-minded, and that was his last visit.

These are the facts which shew a perfectly hopeless case for attacking the disposition of property made by the testator either on the grounds set forth in the caveat or upon the vague oral intimation alleged to be given by the testator a quarter of a century before his death, that he would leave the son something by will. How then does it come that the defendant appeared willing to settle the plaintiff's claims by paying \$1,400? It is to be noted that Mary makes no claim on the estate and takes no part in this litigation; and further that the alleged claim of Catharine for nursing was not in any way referred to before the defendant, it being supposed and believed that she (Catharine) had been paid by the testator all that he had promised to pay her—at so much per week. This apparent family compromise turns out to be really a surrender by the defendant at the bidding of the plaintiff because of his knowledge and use of a family secret. That secret may be revealed by the use of the plaintiff's own words in the letter dated November. ———, 1911, written to the defendant after he had been examined for discovery in this action:

“I am going to use what evidence I can get to shew that I had good reasons to enter a caveat against the will You know that my father was induced to make his will in the way he did just because of that child that Walter declared did not belong to him, and my father told us when he lived with us in Uxbridge that the child did not belong to Walter and did not look like him, and went so far as to hint pretty loudly who it did belong to and there are others in Scarborough who will be brought to tell what they know.”

“You will remember that I was in Scarborough that day that Walter laid drunk on the side of the road after being up at Markham and threatened to leave you and you know his reasons, and he told them to some others in Scarborough All I want is my rights.”

This precious epistle was enclosed in an envelope and addressed to Mrs. Jane Cox and marked “personal” with a double injunction marked on the envelope and written

again on a strip of paper to the postmaster. "Please see that the enclosed letter is given to no one else but to Mrs. Cox," and the whole put into an envelope addressed to the postmaster at Malvern. This outside envelope is stamped as of 24th November at Malvern and as of 25th November at London where it was posted. This is a mute indication that people at Malvern are not to be hurried. This letter begins: "Dear Sister Jane" and ends "Your Bro. Will" and has at its opening "without prejudice." The plaintiff has some knowledge of the niceties of law such as that he should not draw an instrument of which he gets the benefit and he doubtless thought that this would be a secret missive not to be revealed or used against him in Court. And he hoped, no doubt, that it would work no less efficaciously in writing than if given by hint or word of mouth. But the authorities shew that this kind of letter containing threats not written for the purpose of a bona fide offer of compromise is not within the category of privileged documents.

On grounds of public policy letters written without prejudice and written bona fide to induce the settlement of litigation are not to be used against the party sending them. But when the offer embodies threats if the offer be not accepted it is in the interests of justice that such tactics should be exposed and no privilege protects. *Kennedy v. Spence*, 58 L. T. 438, 441; Phipson on Evidence, p. 211; *Pirie v. Wyld*, 11 O. R. 422.

A critical point in the case was reached at the beginning of the cross-examination of the plaintiff. I quote: "You said you never made any threats to this woman? A. I never made any threats. Q. You did not make any threats on the 4th or 5th May? A. Oh, no. Q. Or on any other occasion? A. Threats—No, sir." Then counsel calls for the letter, but further questioning is frustrated by the ruling that it was not admissible. Now this letter when looked at and read on this appeal is fatal to the plaintiff's success. The trial Judge believing the answers made by the plaintiff gives judgment in his favour. But this letter is full of threat and menace of the basest kind and so his answers must be discredited for this letter discloses his threats and therein stamps him as untruthful, and its contents reveal that he is also unscrupulous.

Leaving Mr. Gregory on 3rd May the plaintiff paid his visit to defendant—and this visiting her was a new thing

that had not happened before—to the defendant on Wednesday the 4th May, 1910. She had heard nothing about the will from the plaintiff or her sisters but it appears that the solicitor of the executors Mr. Gregory had with the executor Morgan called on her in the early part of April to see about the details of the estate with a view to obtaining probate. The affidavit of the other executor Wyper as to value was made on the 20th April. Mr. Gregory says that he found her at the time of his visit in a “very frail condition.” She had been married about 13 years and had children other than the one who takes under the will the mortgage intended for her by the testator—her grandfather: notwithstanding and perhaps because of his knowledge of the stigma which attached to her birth. The plaintiff being asked, identifies her thus: “Q. And that is the girl that was born as the result of something being up with the mother? A. That is the girl.” The allusion is to the expression used by the mother in giving the scraps which she was able to recollect of this private one hour’s interview with her brother on 4th May. I quote “He told me he had stopped the business. . . . He said that I knew why my little girl got the money left to her, (i.e., the \$1,000 mortgage), I said was it because there was something up with me when I was married? At this stage of the examination and often afterwards she failed to remember what he said as to that and to other matters germane to it. No one can tell the strain put upon her by the exposure in public Court: she felt tired and faint and finally collapsed and the Court adjourned early. It is to be regretted that on the resumption of the case next morning she had not been asked to put in writing in Court what she remembered but this was not done and she was overwhelmed with varied questions which far from helping only hindered and embarrassed her. On the other hand the plaintiff answered evasively and “hedged” on the different occasions when his cross-examination was nearing this critical point. As a short sample I put in a page which exemplifies his manner of answering while being examined for discovery: being questions from 127 to 142 inclusive which is to be inserted here.

127. Q. You did not tell her the grounds upon which you were going to break the will if she did not give in now? A. No.

128 Q. You told her that you were going to fight it? A. Yes.

130 Q. You know the history of the little girl? A. Of the granddaughter.

131 Q. Yes, of your niece? A. I know partly the history of it.

132 Q. Say yes or no? A. If I could tell how children come in every family I could tell you, I know the child was born.

133 Q. Did you make use of that in talking with your poor, feeble, consumptive sister? A. She is not consumptive.

134 Q. Weak-lunged; did you make use of that? A. Her name was mentioned as receiving a thousand dollars, which she should not have. I made use of it in that way, that she got a thousand dollars that the rest of the family should have, I did make use of that.

135 Q. Did you talk with poor Jane about what would happen if you smashed this will which your father had made? A. What would happen?

136 Q. How the property would go if you smashed the will? A. I guess I did.

137 Q. What did you tell her? A. If the will was broken, then we would share and share alike I think that is what I told her.

138 Q. Did you tell her that your proposition was a little better for you and Mary Ann and Catharine, than that? A. I do not think so, because it would not have been.

140 Q. Did you say what would happen to the little girl if the will was broken? A. That that thousand dollars which she was to get would go to the rest of us, yes.

141 Q. Did you play upon the mother's timid horror of publicity? A. I do not think so.

142 Q. Did you play upon the fear of the woman who has made a misstep and who was your own sister? A. Only as I am mentioning here.

No one can read the plaintiff's evidence (with the light reflected from this letter) and fail to see that the man knew how to touch the sore spot in his sister's past life.

No one who reads the defendant's evidence (with the light so reflected) can fail to see the cause of her mental disturbance, her distress of mind. She could not collect her senses. She failed to recollect and that at many critical points when if she were an untruthful witness it

would have been simple and easy for her to fabricate favourable responses.

Consider the parties pitted against each other in the absence of the husband and children and in the seclusion of the farmhouse: he being a book-keeper but giving evidence as an "insurance solicitor" whose business it was to persuade people and who had the adroitness and resourcefulness and assurance possessed by a shrewd man in that line of business. She the youngest of the family in frail health (as he admits), nervous, without knowledge of affairs and without advice,—burdened moreover with a secret condoned after 13 years of married life but now likely to be revealed in all the publicity of an open Court. He takes out a copy of the will and reads it to her: he says he has authority to come down and break the will and that she had to get on her knees because there was going to be a big storm. Confronted with the last statement all that the plaintiff can say is: "To the best of my recollection and knowledge I said no such thing."

Again he said (with reference to the farm willed to Mary which the testator before his death sold and conveyed to her) "the selling of the farm to Mary Ann could break the will." This statement is not contradicted by the plaintiff.

Again he said if the will was broken I would lose everything and my sisters would come in for the money that was left to me, (i.e., the residue) and my little child would lose hers. . . . He said he had stopped the business. . . . I did not know what a caveat was. To stay all this turmoil and expense she was to give up the money in the bank (which turned out to be about \$750) and to pay out of her own pocket \$700 besides.

This because as he said in his letter to Morgan she and the girl get the entire estate. What was the entire estate given by the will? As valued by the affidavit of the executor Wyper as follows:—

Household goods and furniture	\$ 10
Mortgage to child (to be paid to Mrs. Cox) ..	1,000
Cash in bank (reduced by expenses to \$750)	1,000
The small lot to Mrs. Cox, value	400
	<hr/>
	\$2,410

The plaintiff makes grave complaint of the "organ" being given to the child: an old organ bought as is proved

by his mother and like the land (as he says) intended for him. The mother died in 1885 and the organ of that age was included in the valuation at \$10. The woman appears therefore to have been willing to strip herself of all she gets from her father, i.e., \$700 in bank and \$400 in lot and give \$300 more to save the mortgage for her little girl and save both of them from public shame. It is necessary perhaps to say a little more of what took place after the 4th May. The plaintiff permitted her to talk it over with her husband that night and he would return in the morning. I suppose the wife communicated the proposition and her misery in some way to her husband (what passed was not and could not be given in evidence) but at all events the effect on the man was simply stupefying. He is, I judge, a slow-witted man: if not exactly stupid, certainly not one to be looked to in an emergency. The plaintiff agrees that any conference between the two would not much help either of them. He is asked: "Of course they did not contribute much to each other's wisdom? A. I cannot help that. . . . I done the best I could." That is I think true. He did the best he could and it was a very bad best. Walter Cox when examined appeared to be all at sea: he says: "my wife got worried over it and it got me rattled . . . my wife was so much worked up about it and nervous that it got me rattled, and I would not talk to the plaintiff." "My mind was in a queer state that day" (5th May.)

I spoke in the house of getting some advice before she signed and before going to Wyper's (the executor) . . . I did not think of advice at Wilson's (who drew the agreement) it was too far gone; he had us beat. I was beat completely. My idea was when I spoke about getting advice I wanted to come to Toronto but he said he had not time—to-morrow was the last day to act.

Neither my wife nor I said at our house that we would give what the plaintiff asked. They both contradicted in this, the statement of the plaintiff as to their having given audible assent.

I was not thinking of giving the money in Wilson's office for I was bothered quite a bit.

He also affirms what his wife says that the plaintiff told them he had authority to break the will, and if it was broken we would lose the money, and the girl would lose the \$1,000.

Walter says when the paper was laid before his wife to sign he said, "hold on, not to sign." I wanted him to leave the paper with me, and I would mail it to the lawyers . . . he would not do that; then I said, we'll go ahead and sign.

I may note in passing that the plaintiff appears to have had complete influence over his sister Mary; she was not privy to this arrangement, and in returning from the draftsman's office the instrument was taken to Mary's house who was to sign first and plaintiff said, "I wonder if she will be satisfied with the agreement; if not she will have to sign." She did sign, but it is said she has renounced any claim. The other Catharine did not appear, nor was she examined as a witness. Of course whatever claim she may have for nursing will not be affected by the dismissal of this action. She may still proceed against the estate or the recipients of it.

Neither husband nor wife knew anything about law; the talk of a caveat would only mystify them and his protestations of his authority to break the will and the effect on the will of part of the land having been sold would only tend further to mislead them. It was eminently a case calling for competent advice, but any attempt to seek this was checked by the peremptory veto of the plaintiff—in effect presenting the filing of the caveat and the purpose of the warning given him as to entering an appearance—to hurry matters to a close while yet the defendant was under the shock of his demand and fear of the consequences which would follow its refusal.

When the plaintiff was asked if he was not an overmatch for husband and wife he replies with his usual indirectness, "Not necessarily."

I cannot doubt that the woman was overmatched, and overreached by her shrewd brother. From the moment of seeing her he kept her in hand till the paper was signed on 5th May. He knew that the husband's advice would rather confuse than help her, and he resolutely refused any opportunity for them to get independent assistance. When they did get such assistance the result was a letter dated 14th May in which the instrument sued upon is repudiated and the reasons given for its repudiation.

There is another aspect of the plaintiff's evidence that I may briefly advert to. He is asked: "Why do you object to the little girl getting the money? A. She had no claim to it, she had no right to it. Q. How do you mean no claim to it?"

A. No right to it; no moral right whatever . . . the little girl had no legal right to the money; he left her money that should have been left to us; I made her understand that. We can read into this the method by which the brother made her understand that that little girl had no legal or moral claim on the testator or to the money. It is worth while also to give his answers to the application for delay and to get advice. Asked why did not you let this woman and her husband have 3 or 4 days to go and consult their solicitor? A. I could not. Q. Why? A. They had from Wednesday. Wednesday night I went there and they had from (? to) Thursday morning. Q. Why did you not let them go? A. It was not asked." The defendant gives the reason plaintiff gave for refusing them time to get advice. It was this "that he had just till to-morrow to act." And the husband says the same thing; plaintiff said he had not time; to-morrow was his last day to act . . . I did not know what he meant.

I have gone over the main turning point and the subsidiary ones on which the judgment should turn. Everything else in the way of detail is of little moment. There was the going to the executor Wyper, to see if he would draw the paper. He moralized that it was a good thing parties could agree together and passed them on to a lawyer. Mr. Wilson simply put the thing into legal shape according to what Underwood told him and all this was in the absence of the wife. She had no one but her husband, who was baffled in his attempt, and gave it up. No doubt she was able to go about the house and attend to domestic routine getting dinner ready and the like, but that is really no more to the point than to suggest that because the brother kissed her as he left in the evening of the 4th May, that he had the most fraternal regard for her and that she reciprocated his friendship.

The plaintiff had no belief in his flimsy claims upon his father or upon his estate or in respect to the validity of the will; his whole action indicates a scheme to put money in his pocket (by hook or by crook) at the expense of his sister.

The judgment should be vacated and the action dismissed with all costs below and in appeal to be paid by the plaintiffs.

HON. MR. JUSTICE LATCHFORD:—I agree in the result.

HON. MR. JUSTICE MIDDLETON:—Upon the facts there seems to me only one conclusion possible. The bargain itself

and all the surrounding circumstances shew that there must have been fraud or over-reaching on the part of the plaintiff. There was mental inequality between the contracting parties, and the stronger was possessed of a weapon which he did not scruple to use in his attack upon the weaker. Therefore, to me at least, it seems plain that the transaction cannot stand.

When it is made to appear that the bargain was not a fair compromise of a real dispute, but a complete surrender to a groundless attack, suspicion is at once aroused; and when the plaintiff is revealed—not only by his letter, but by his evidence—as cruel and unscrupulous and as a man ready to use an incident in his sister's life for his own financial advantage, and reckless enough to attempt to cause the sister to abandon her defence to this action by the use of the same threat—and cunning enough with his superficial smattering of legal knowledge to think that he could conceal this last attempt by the use of the words “without prejudice”—I am compelled to the conclusion arrived at by my lord the Chancellor, that the contract sued upon is in truth a “nefarious transaction.”

The true function and office of the words “without prejudice,” is well defined in *Pirie v. Wyld*, 1886, 11 O. R. 422, where it is said that “all communications expressed to be written without prejudice, and fairly made for the purpose of expressing the writer's view on the matter of litigation or dispute, as well as overtures for settlement or compromise, and which are not made with some other object in view and wrong motives, are not admissible in evidence.”

This rule, founded on public policy, cannot be used as a cloak to cover and protect a communication such as the letter in question, which contains no offer of compromise, but a dishonourable threat.

HON. SIR JOHN BOYD, C.

MARCH 25TH, 1912.

JARRETT v. CAMPBELL.

3 O. W. N. 905; O. L. R.

*Appeal to Divisional Court—From Judge in Chambers—Trial—Jury
—Action on Question of Testamentary Capacity—Witness—
Motion for Jury—Discretion of Judge.*

FALCONBRIDGE, C.J.K.B., *held*, 21 O. W. R. 447; 2 O. W. N. 872, that an action on the question of testamentary capacity, where the trial would likely last two weeks and over 100 witnesses would be called, many of whom would be expert, should be tried by a Judge, without a jury, as the circumstances would be such as to make it unlikely that the mind of the jury could be concentrated upon the real issue.

BOYD, C., *held*, that having regard to the issues raised and their magnitude and the complexity likely to arise in trying to sever the methods of trial in investigating the facts of the controversy, the above judgment was a wise exercise of the Judge's discretion, and refused leave to appeal to Divisional Court.

Motion by the defendant Campbell for leave to appeal to Divisional Court from an order of HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B., 21 O. W. R. 447; 2 O. W. N. 872.

G. Grant, for the applicant.

I. F. Hellmuth, K.C., for the plaintiffs.

J. R. Meredith, for the infants.

HON. SIR JOHN BOYD, C.:—The application seeks to unsettle the practice and course of procedure by going back to one of the earliest statutes of old Upper Canada. Yet even in England, where the statute law of England was, so far as applicable to the condition of this province, adopted in 1791, the course of practice was not to regard the claim of the heir at law to have an issue tried before a jury as an absolute right, but one to be dealt with according to the circumstances. Thus in *Man v. Ricketts*, 7 Beav. 101, Lord Langdale declined to direct such an issue, the will having been otherwise sufficiently proved as against the heir. Indeed, the real reason why the trial at law and, therefore, by a jury was granted in England was because of "the frail and imperfect manner of examining into facts," then possessed by the Court of Chancery. The words are those of Lord Erskine in *White v. Wilson*, 13 Ves. p. 91. This case is cited by Ferguson, J., and the wrong volume given in *Re Lewis*, 11 P. R., at p. 108, and it is now not to be questioned that such a reason does not exist in Ontario, where all Courts

alike have the fullest power and the most searching method of investigating facts. The old course in England was to file a bill for the purpose of establishing the will as against the heir with regard to realty. Then there would be a hearing of such evidence as was admissible in equity practice, and if a sufficient *prima facie* case of proof was made out, then an issue would be directed (*devisavit vel non*), in order to establish conclusively as against the heir the fact of a valid will made by a competent testator. See the course pursued in *Waters v. Waters*, 2 De. G. & Sm. 599.

The English practice grew out of historical reasons. Until the Probate Court Act of 1857, 20 & 21 Vict. ch. 77, there was no jurisdiction to admit a will of land to probate. The only mode of testing the validity of such will was by an action of ejectment between the heir and the devisee. But in our practice the probate of will includes realty and personalty; realty is becoming more and more assimilated to personalty; with us the unique distinction of heir at law never obtained, for all children shared equally. All the reasons which necessitated (almost) a jury trial as against the heir at law in England never existed here; and our practice is settled, whether the contest be in the lower Court or upon the removal of the contention to the High Court, that the trial of fact by jury is a matter for the sound discretion of the Court or a Judge: R. S. O. ch. 59, sec. 22 and sec. 35. These sections are conclusive as against any vested and absolute right of the heir to insist on a trial by jury. The practice was well settled by a very careful Judge (1885), *Re Lewis*, 11 Pr. 107, and I see no reason to doubt the correctness of the order of the Chief Justice of the King's Bench or to doubt that he wisely exercised his discretion, having regard to the issues raised and their magnitude and the complexity likely to arise in trying to sever the methods of trial in investigating the facts of this controversy. I disallow leave to appeal; and costs of executors and other beneficiaries opposing should be paid out of the estate.

HON. SIR JOHN BOYD, C.

MARCH 25TH, 1912.

ADAMS v. GOURLAY.

3 O. W. N. 909; O. L. R.

Will—Construction—Conditional Bequests—Contra Bonos Mores—Revocable upon Failure to Fulfil Conditions — Distribution among Other Legatees Named in Will — Legatee Named in Codicil—No Locus Standi.

An action for the construction of the will of the late George Baker, for an account of his estate from his executors, and on order that defendants, the Misses Baker, do refund to the executors the estate paid over to them respectively, and for an administration of the estate and payment over to the parties entitled.

BOYD, C., *held*, that the testator's nieces, the Misses Baker, had substantially fulfilled the condition that they should reside with and care for the testator during his life.

Where testator directed that in case the above condition was not fulfilled then the legacies should be divided among the other legatees named in his will. *held*, that a legatee named in a codicil had no *locus standi* to maintain an action against the nieces, and dismissed her action.

G. G. McPherson, K.C., for the plaintiff.

F. H. Thompson, K.C., for the defendants.

HON. SIR JOHN BOYD, C.:—The testator gives the bulk of his property to his two nieces, who are, with the executor, defendants, upon this condition: "Upon their remaining with me as my housekeepers at all times (unless I consent to one or both of them going out), during the remainder of my life, and during that time rendering me faithful service and giving me all necessary and proper attention and all proper care and nursing in case of illness or in case I should become feeble and should they fail in those respects or any of them I hereby absolutely revoke the said devise and bequests to them and direct that in lieu thereof my executors shall pay to my said niece Sarah Elizabeth Baker the sum of two hundred dollars only, and I direct that their shares be distributed equally among the other legatees named in this my will."

"And I hereby further declare notwithstanding anything hereinbefore contained that it is not my will or intention that it shall be compulsory for both of my said nieces to remain with me at all times, but that it will be sufficient if one of them is with me when I am in my usual health and that both of them shall be present when I require the services of both and so notify them."

The will was made in February, 1907; a codicil was added giving the legacy of \$100 to the plaintiff under the name of Ellen Hamilton—she not being named or referred to in the will—codicil dated in September, 1908. The testator died on the 27th September, 1910. His wife died in 1906, and he had no children. I am not clear as to his age, but I think it was about 80. The nieces did not know of the terms of the conditions or of anything that was in the will—nor did anyone, according to the evidence, but the solicitor who drew it (who was not called as a witness). The nieces, however, lived with him and cared for him as it turned out according to the terms of the condition, however, strictly construed, from before the date of the will and just upon the death of his wife until the 19th July, 1909, when a change in his health and habits became very apparent, which had begun about the date the physician was summoned during February, 1909; then at his instance more competent assistance was called in under the supervision of the nieces, and this state of domestic affairs continued until his death.

Then first became known the condition expressed in the will; and, on a review of and with knowledge of all that was detailed before me in evidence, the executor paid over or turned over to the two beneficiaries the property now claimed (in part) by the plaintiff. The plaintiff, as she testified, sues on her own behalf solely, and is not joined by and does not represent any other possible claimants under the will.

I expressed my opinion as to the effect of the evidence at the close of the argument, but reserved judgment generally. I now deal first with the right of the plaintiff to maintain this action.

In *Henwood v. Overend*, 1 Mer. 23 (1815), the residue was to be divided “among the legatees in proportion to the sums bequeathed to them by this my will.” By a codicil specified “to be added to and taken as part of the will,” other legacies were given to other legatees. Sir William Grant, M.R., held that the legatees under the codicil were excluded from sharing in the residue; and that the words “by this my will,” were not less strong than the words “hereby” and “hereinafter,” which were so restrictively construed by the Lord Chancellor in *Bouner v. Bouner*, 13 Ves. 380.

Sir William Grant’s decision was approved and followed by Shadwell, V.-C., in *Hall v. Severne*, 9 Sim. 515 (1839),

where the residue was to be proportionably divided among "the hereinbefore mentioned legatees;" and in a codicil which he declared to be a part of his will he gave other legacies to other persons and also additional legacies to those who were legatees in the will. It was held that none of the legatees under the codicil were to share in the residue in respect of their legacies under the will. The Vice-Chancellor declined to follow the case of *Sherer v. Bishop*, 4 Bro. C. C. 55 (1792), in which Lord Commissioner Eyre said that a codicil was a part of the testamentary disposition, though not part of the instrument and on this ground that the residue should be divided among legatees (described as "such relation only as are mentioned in this my will") and other legatees also being relations named in the codicil. The two other Lords Commissioners Ashhurst and Wilson, hesitating a good deal at this extension of the word "will" and doubting the construction. Shadwell, V.-C., favoured the opinion of the hesitating and doubting Judges and characterized that of the Chief Commissioner as "a very extraordinary one." The concurrence of opinion in two such Judges as Grant and Shadwell, both skilled in questions of construction, may well be followed without hesitation. The words used in this will are identical with those used in the case in 1 Mer.

Looking at this will per se I would not think the testator's meaning to be doubtful. He directs that the property intended to be given to his two nieces which upon their default in certain conditions is to be revoked, shall then be distributed "equally among the other legatees named in this my will." The codicil does not in terms say that is made part of the will as in the *Severne Case*, but it confirms the will and gives other pecuniary legacies to persons not named in the will. The obvious meaning to my mind is that the testator named in the will those who share equally in the revoked property and does not intend that the legatees first named in the codicil shall come in to diminish what is given to those named in the will.

It was said in argument that *Hall v. Severne* has been discredited. On the contrary, I find it has not been impeached, but rather upheld. It was followed in *Early v. Benbow*, 2 Coll. 342, and both cases were referred to as authorities by Farwell, J., in *Re Sealy*, 85 L. T. R. 451 (1901), and was held to be rightly decided by Sullivan, M. R., in *Donnellan v. O'Neill*, Ir. R. 5 Eq. 532 (1871), on the

ground that the shares of the residue were fixed by the will and so were the persons to take them and there was nothing in the codicil to alter this express gift. And in addition to all this it was followed as late as 1907 by the Divisional Court in *Re Miles*, 14 O. L. R. 241, a decision binding upon me.

There is no doubt of the general principle that a codicil forms part of the will or testamentary instrument, but not necessarily to all intents and purposes. As said by Lord Hardwicke, C., in *Fuller v. Hooper*, 2 Ves, Sr. 242 (1750), but the testament may be made at different times and in different circumstances, and, therefore, there may be a different intention at making one and the other.

I hold, therefore, that the present plaintiff, being a legatee only by virtue of the codicil signed and made on the 9th September, 1908, is not one of the legatees contemplated in the will made on the 7th February, 1907. This being so and the evidence is that she sues only for herself and in her own behalf, she has no locus standi to question the conduct of the executor in paying over the property devised to the two nieces who take under the terms of the will.

This lessens the importance of the main question as to whether these nieces are entitled to take the property. My impression at the trial was that upon the facts there had been a sufficient complaine with the conditions requisite to their success. I refer to my comments on the evidence at the close of the trial as follows:—

“ True it is that ignorance by the beneficiary of a condition annexed to a gift by will does not protect the devisee from the consequences of not complying therewith: *Astley v. Esser*, L. R. 18 Eq. 290.

“ There is a good deal to be said in favour of the view presented by the defendant’s counsel that the conduct of the testator, his words and acts in regard to his nieces and in their presence, were so fraught with sexual aberration as to render the requirement of residence with him as one *contra bonos mores* within the meaning of *Brown v. Peck*, 1 Eden 140. This, of course, does not appear upon the face of the condition, and requires to be established (as it was established) by the evidence. This conduct would absolve them from continuous residence and would justify their having him cared for, as they did, by a married woman and her husband, who were able to control the testator; so that, in

equity, the testator himself worked a discharge of the conditions."

I still think that there was a substantial performance of the condition by the nieces; and, if so, by the application of the *cy-pres* doctrine the condition has been practically satisfied. In Williams on Executors assent is given to the law in Story's Equity Jurisprudence that where a literal compliance with the condition becomes impossible from unavoidable circumstances and without any fault of the party, it is sufficient that it is complied with as nearly as it practically can be, or as it is technically called *cy-pres*; Williams, 10th ed., p. 1013 note (e).

But, in view of my decision upon the status of the plaintiff, I do not further pursue the inquiry on this branch of the case.

The action should stand dismissed, but I would give no costs against the plaintiff unless she appeals. Costs out of the estate to the defendants in any event.

HON. SIR JOHN BOYD, C.

MARCH 27TH, 1912.

HUEGLI v. PAULI.

3 O. W. N. 915; O. L. R.

Church—Property Rights—Construction of Religious Institutions Act—Right to Land and Meeting House—Abandoned as a Place of Worship—New Site Purchased—Construction of Trust Deed—Breach of Condition—Status of Minister—Rights of Congregation.

An action by plaintiffs for a mandatory order compelling defendants to reopen an old church for worship and to allow plaintiff Huegli to conduct public worship therein according to the ritual and regulations of the Evangelical Lutheran denomination, for a declaration that plaintiffs were entitled to have the trusts of the deed of church carried into execution, for an injunction restraining defendants from leasing or selling said church or lands and from using or allowing same to be used for purposes other than declared in the trust deed, etc. The original society built and took possession of a meeting house on the said land and occupied the place for religious uses down to December 13th, 1908, when the premises were vacated. The building became too small for the congregation, and it was resolved almost unanimously in 1908 to sell the old site and buy a new one.

BOYD, C., *held*, that the question involved no question of doctrine, but only of property. That the legal title was in the defendants and no breach of trust had arisen in regard to which the plaintiffs had a right or interest to complain, but it was a legal breach of trust to remove from the site, which should be investigated by another method. Action dismissed.

F. H. Thompson, K.C., for the plaintiffs.

R. S. Robertson, for the defendants.

HON. SIR JOHN BOYD, C.:—This is a church case, not involving questions of doctrine, but only those of property. All the litigants are of the Evangelical Lutheran denomination, holding the doctrines set forth in the unaltered Augsburg Confession, and both parties claim conflicting rights under one and the same deed of trust.

The plaintiffs' statement of case appears simple, but upon the development of the facts at the trial questions arise of difficult and complicated character, which have not been considered by our Courts. I do not purpose to deal with more than are necessary to determine this action. Three plaintiffs are on the record, but at the hearing they asked leave to sue "on behalf of others." An initial difficulty arises as to "who are the others?" That remains as yet undefined. The defendants are alleged to be and are the trustees of the legal estate in the church property in question, and breaches of trust are complained of. No doubt, the rule is well settled that a member of the society may sue on behalf of himself and all the members of that society to prevent a breach of trust, or it may be that if he stands alone he may sue in his name for an injunction; but it must appear that he has a legal interest to intervene. So I pass for the present from the question of parties and the locus standi of the plaintiffs.

The trust property was acquired in July, 1874, by conveyance in fee simple from Alexander Grant, of Stratford, for an expressed consideration of \$200. The conveyance is made to three persons appointed to be trustees (under the statute then in force, 36 Vict., respecting the property of religious institutions) for the purposes therein set forth. The recitals shew that a then existing religious society or congregation of Evangelical Lutherans had occasion for the land purchased and conveyed as a site for a house of public worship and had appointed three persons to hold in perpetual succession under the name of "Trustees of the Stratford Evangelical Lutheran Church," for the use of the said society and upon the trusts thereafter set forth.

There are two "special trusts" (to use the phrase of the deed): First, that the premises shall be forever hereafter held for the use of the members of an Evangelical Lutheran

Church, which shall be exclusively composed of persons holding the doctrines of the said Augsburg Confession; and second, "that the trustees shall at times hereafter permit any minister, he being duly authorised by the said Evangelical Lutheran Church to conduct the worship thereof, to officiate in the church existing or which may hereafter be built on the said lot according to the ritual, etc., of the said church, and shall also apply the rents and profits derived from any portion of the said lot or the buildings erected thereon towards the maintenance of public worship in the said church or meeting house according to the rules, etc., or towards the repairs or improvement of the said property and to no other purpose whatsoever."

It is to be noted that the word "Church" is used in two senses in different parts of the conveyance; at times referring to the religious society, and again to the particular meeting house on the premises.

The recitals shew that the conveyance was obtained under the powers conferred upon religious societies by the provincial statute then in force, 36 Vict. ch. 135, sec. 19, which provides that in every case the special trusts or powers of trustees contained in any deed, conveyance, or other instrument, shall not be affected or varied by any of the provisions of this Act. That clause is carried into the latest revision of the same Act (R. S. O. 1897, ch. 307, sec. 23). This Act gives power to sell the land when it becomes unnecessary to be held for the religious use of the congregation, and it is deemed advantageous to sell, etc.; sec. 7 of 36 Vict.

This original society built and took possession of a meeting-house on the said land and occupied the place for religious uses down to the 13th December, 1908, when the premises were vacated under the following circumstances:—

The congregation was growing from year to year, and it became a question whether the old building should be repaired and extended or another site should be procured and a new building erected.

By the record in the church minutes it was on the 17th December, 1906, resolved unanimously that a new church should be erected. There was some fluctuation of opinions and of resolutions as to the locus, but finally it was moved and carried at a meeting of the congregation held on the 24th January, 1908, that a new lot should be bought, and on the 28th August of same year that the old lot should be

sold. This vote also appears to be practically unanimous, only one person (who is one of the plaintiffs, Allstadt) voting "nay."

The new building being put up on the new lot, the congregation as a whole took possession of the new building on Erie street on the 13th December, 1908, when the new meeting-house was formally opened. There does not appear to have been what is called a "split" in the society. Some members may have been reluctant or inert, but only the one who voted "nay" upon the question of sale is in evidence as being actively dissentient. The pastor of the society that moved into the new building says, "Practically the whole congregation went with me." He names the plaintiff Allstadt as the only exception. Another plaintiff, Racey, was active in support of the new movement and voted in favour of it at the meetings.

After vacating the old site, the trustees, acting on the direction of the congregation, rented the buildings thereon, and applied the surplus of rent after paying taxes and insurance for the benefit of that congregation and of the new site. The trustees also in like manner sold four feet of the land, and are now offering the rest for sale. The trustees of the Erie street lot (now defendants) claim to be the legal owners of the old site, and this is not in effect questioned by the plaintiffs in the present case. The object of the suit is to restrain the sale and get a right of entrance to the old building (which is on Cambria street) in order to make use of it for religious services in the interest of a body of people represented by the plaintiffs. This movement in regard to the new body began in February, 1911, by the forwarding of a petition with twelve signatures to the plaintiff Huegli, who is an Evangelical Lutheran clergyman of the Synod of Missouri and in good standing as a member of that Synod, inviting him to take up ministerial work in Stratford. He came, and a hall was rented on Downey street, and there he began to organise a congregation, and was joined by the plaintiffs Racey and Allstadt and two or three others who had been members of the congregation worshipping in Cambria street, and also by some outsiders, aggregating in all about 20 members—the whole number of present adherents in Downey street hall being about 100.

To go back now to analysis of the petitioners and their standing in the Cambria street church at the time it was

resolved to build a new meeting-house on another site we find that five of these were not members of the old church; one, Hembruch, was not in good standing since 1906 and had no right to vote in the old church; and of the remaining six, Homan attended the Erie street meetings for a while; Schroeder subscribed for the building of the new church and became liable on the bond for its debt and also attended at Erie street for a while; Wolf subscribed towards the new building and went over with the majority; Redding is now a member of the Erie street church and in good standing, (i.e., making his payments, etc.); Racey went over with the rest to Erie street church, and, as has been stated, was an active advocate of the change; and the last of the twelve, Allstadt, is the only one who has opposed and stood aloof from the new movement.

The situation as it has been developed is not provided for in the four corners of the deed of trust. Only two conditions are there dealt with; (1) When all is going on in due course by the occupation and religious use of the trust property by the congregation of the Stratford Evangelical Lutheran Church; and (2) When the church for which the "trust was created shall lose its visibility and cease to exist"—then the control of the property is to pass over to and vest in the nearest Evangelical Lutheran Church of the same faith and order.

The action is framed on the theory that this second situation has arisen—by assuming that the vacating of the old site is equivalent to the cesser of existence of the beneficiary. This proposition cannot, it seems to me, be sustained. The church in possession under the deed of trust has for sufficient reasons decided no longer to remain on the trust property, and the question as to what is to be done with that property cannot be solved by reference to this latter provision in the deed of trust.

The newly organised body containing a few members of the former church society has applied for leave to enter upon the old site by notice about April 12th, 1911, and failing to get satisfaction this action is brought on the 1st February, 1912, seeking a mandatory order on the defendants to enforce the reopening of the church and to allow the plaintiff Huegli to conduct public worship therein and for a declaration to have the trusts of the deed carried into execution, and to have the sale stayed and the rents applied

under the trust to the old site. By the terms of the deed the land is held on the special trusts that the same shall be forever held and enjoyed for the use of the members of an Evangelical Lutheran Church and that the rents, etc., shall be applied to repairs and improvement of the said property and to no other purpose whatsoever.

The plaintiffs' broad contention is that the lands cannot be sold and that the rents (if any) cannot be diverted from the perpetual purpose of retaining and improving the trust property. They claim to represent some of the beneficiaries, being members of the original congregation for whose use and benefit the trust was created, and that the majority cannot by any vote or action overrule and extinguish their rights and claims.

The broad contention of the defence is that there is no private right of action; that the beneficiary is the society or congregation, and not any individuals of it, and that the society as a whole are represented by the Erie street church. That as to the sale and the application of the rents they invoke the benefit of the statute referred to in the deed, and even if the rents were misapplied it is a grievance to be complained of by the Attorney-General, and not by the plaintiffs.

This Act no doubt provides for the sale and leasing of church lands when it becomes unnecessary to retain them for religious use, upon the consent being obtained of a majority of the members present at a meeting duly called for that purpose; and, so far as all necessary preliminaries are concerned, this place may well be sold or leased if the Act applies. But the plaintiffs rely on sec. 19 of the Act, which provides that in every case the special trusts or powers of trustees contained in any deed shall not be affected or varied by any of the provisions of the Act. In this deed we find expressed as "special trusts;" (1) that the land shall be forever hereafter held and enjoyed for the use of the members of an Evangelical Lutheran Church; and (2) that the rents and profit derived from any portion of the said parcel of ground or the building erected thereon shall be applied towards the maintenance of public worship in the said church or meeting-house, towards the repairs or improvement of the said property and for no other purpose whatsoever. This last special trust is peculiarly emphatic in being impressed on the very place and the building (the meeting-house) thereon.

Unless I can nullify these special trusts, the land cannot be sold or the rents diverted to another place. And, as I read the statute, it forbids the nullification of these special trusts. The effect of this statute has not been considered, I believe, by the Courts in the aspect now presented. The aim of the legislature appears to be to give a right of alienation to a religious body holding lands by trustees capable of perpetual succession. The statute leaves out cases of special trust and deals with lands held by the corporation on the general trust or obligation of using the property for the purposes contemplated at discretion.

But, apart from special restraining trusts, when the body outgrows its building and the majority so decide that it has become necessary and advantageous to dispose of the property with a view of removing to a more convenient situation, then the statute promotes the benefit of the body by sanctioning such a course; and a sale so had, which is a conversion of the present property, cannot be regarded as a diversion or a breach of trust.

But, if words are found in the conveyance which forbid a change of site, the statute does not mean to violate that term of the contract, but lets the parties abide by the bargain they have made when the property was acquired. By the terms of this deed the land is bought for the possessory use and benefit of the particular local church as a congregation, and is to be maintained and improved in perpetuity. The rents and profits, if any, are to be invested in the meeting-house and otherwise on the particular site; the congregation is tied down to that spot as their place of worship so long as the congregation exists. In brief, the trust inheres in the title, and so passes to the successive trustees indefinitely in futuro—not to be interrupted by a sale out and out. This is my reading of the statute and of this trust deed—but the result does not enure to the benefit of the plaintiffs.

Now the present trustees, the defendants, hold this land in trust for the particular church so long as it exists and can be traced and identified. The Stratford Evangelical Lutheran Church of the deed had power to change the place at which its services should be conducted and also to change its name to that of the "Erie street church." These changes of local habitation and name are matters of ecclesiastical concern and cognizance, with which the Courts have

nothing to do. This body, the organisation of this church, is of the independent or congregational system, in which the view of the majority of the members prevails. The minority, however small or large, is outvoted by the action of the majority, and the resolutions to vacate the old place, to sell or rent it, and to move into a new building on a new site, are all matters of congregational competence and are conclusively settled as against the plaintiffs. The identity of the beneficiary church is established in favour of the body represented by the trustees, the defendants. The few who went out and banded themselves together with others in a new organisation worshiping in the Downey street hall, are an offshoot from the old body, but thereby have ceased to be a part of it and can have no right as once members of the original body to claim any part of the property vested in the trustees for that original body; see per Dickerson, J., in *Newburgh Associate Reformed Church Trustees v. Princeton Theological Seminary Trustees* (1837), 4 N. J. Eq. 77, and *Pine Hill Lutheran Congregation Trustees v. St. Michael Evangelical Church of Pine Hill* (1864), 48 Pa. St., p. 20.

That appears to be the situation as regards the religious or ecclesiastical aspect of this controversy. None of the plaintiffs is a corporator or beneficiary because not a member of the old church. But that leaves untouched the consequences of this congregational act of removal in a legal point of view as affected by the legal breaches of trust begun in part and in process of consummation by the sale of the land.

It may be well now to deal with the plaintiff Huegli, who is an outsider (so to speak) and stands alone in his claim. Assuming the non-existence of the church, the plaintiffs invoke that part of the deed which provides that if the church loses its visibility the land forthwith vests in the trustees of the nearest Evangelical Lutheran Church, which in this case happens to be the Erie street church and the defendants the trustees. If so vested with the land in this character, the deed provides that the trustees shall be under obligation to open the church for regular or occasional services to any minister or missionary of the Evangelical Lutheran denomination holding the doctrinal views of the Augsburg Confession aforesaid. This requirement is fulfilled by Mr. Huegli, who is in good standing as a member of the Synod of Missouri and is presented by the newly

organised church in Downey street as a fit and proper person to be inducted for the time being in connection with the services to be resumed on the site owned by the defendants. The difference between this part of the trust and that which relates to the regular services held when the building is occupied by the original church is that in the latter case the clergyman who has the right of entry is one "duly authorised by the said Evangelical Lutheran Church to conduct the worship thereof." The context shews that the source of authority is to be sought not in the denomination at large extending over the continent but in the particular body or church representing the original congregation. There being no lack of existence or of visibility of this latter body, the plaintiff Huegli is a clergyman not competent to officiate, whose claim to conduct the services in the old building may well be vetoed by the trustees. So that, to put it shortly, the plaintiff who complains of a breach of trust by the trustees proposes to enforce against them an occupancy of the site which would be a further breach of trust. Upon the ecclesiastical side the old church body worshipping close by in Erie street regards this more as an attempt to establish a rival church in their proximity for no sufficient cause.

No amendment by enabling the plaintiffs to sue on behalf of others who sympathise with them—and this is essential in order that no incongruity in the class represented may arise—no such amendment would better the cause of action. The legal title is in the defendants, and no breach of trust has arisen in regard to which the plaintiffs had a right or an interest to complain. The breaches of trust must be investigated by another method, probably by the intervention of the Attorney-General and a competent relator, but on that I do not decide. The only possible way of reparation to cure the breaches would be for the Zion Church to retrace their steps, resume possession and re-establish worship in the old site, but I suppose it is now too late for that remedy. It may be that the real solution of the difficulty is to report to the legislature and procure special legislation which may quiet if not satisfy all concerned.

The action must be dismissed, but costs will not be given, considering that the question discussed is new and bare of precedent and that the conduct of the defendants has not been according to law, however honestly undertaken.

COURT OF APPEAL.

APRIL 4TH, 1912.

STONE v. CANADIAN PACIFIC RAILWAY COMPANY.

3 O. W. N. 973.

Negligence — Railway — Brakesman Injured in Attempting to Uncouple Cars—Defective System—Dominion R.W. Act, ss. 264, 317—Interchange of Traffic—Evidence—Findings of Jury.

An action by Roy H. Stone, brakesman, in defendants' employment, for \$10,000 damages, and if not entitled to that then for \$3,000 under the Workmen's Compensation for Injuries Act, for the loss of a right arm, which, he alleged, was caused by breach of defendants' statutory duty to equip their cars with efficient apparatus.

BOYD, C., entered judgment in favour of plaintiff for \$6,000 upon the findings of the jury.

COURT OF APPEAL set aside above judgment with costs if exacted, *holding* that the evidence did not justify the answers given by the jury, to the questions submitted, and that there were no "circumstances" to prevent the plaintiff from adopting a perfectly safe course which he admitted he might have adopted.

An appeal by the defendants from a judgment entered of HON. SIR JOHN BOYD, C., upon the answers of the jury at the trial, awarding the plaintiff \$6,000 damages for injuries received while in the defendants' employment as a brakeman.

The plaintiff was endeavouring to effect a coupling between two box-freight cars, at or near Bolton Junction, a station on one of the defendants' lines of railway, and while doing so was either shaken off or fell from a ladder affixed to the side and close to the end of the car upon which he was riding, and one of the wheels passed over his right arm, necessitating amputation. The box-freight car in question was not the property of the defendants, but had been received and was being hauled over their lines under the interchange of traffic provisions of the Railway Act. It had been received by the defendants at Detroit from the Wabash R.W. Co. on the 14th of March, 1911, loaded with merchandise for various points on the defendants' lines of railway, and on the 18th March, it was in course of return to Detroit, via Toronto Junction, as part of one of the defendants' regular way-freight trains, when the accident happened.

The plaintiff attributed the accident to three causes (a) the ladder being defective because the lowest step, or the step which was placed below the bottom of the car, was not joined to the rest of the ladder, but was separate and attached

to the bottom timbers of the car, and was loose and insecure; (b) there was no ladder on the end of the car close to where the side ladder was, and (c) the coupling-rod used for controlling the action of automatic couplers when about to effect a coupling of cars did not extend outward from the couplers to the side of the car, or within a short distance from it, but was so short as to necessitate the going in between the cars, or at all events to render it necessary to reach very far beyond the side of the car in order to get hold of it.

The defendants denied all liability, and witnesses were examined on both sides. At the conclusion of the plaintiff's case, counsel for the defendants moved for judgment on the ground that no case of negligence had been shewn, but the learned Chancellor declined to withdraw the case from the jury. The motion was renewed at the conclusion of the whole case and again denied.

The learned Chancellor submitted to the jury a number of questions which with the answers returned are subjoined, viz. :—

“1. Was the car in question owned by the C. P. R. or by another company? A. Owned by another company.

2. Was the car and its fittings reasonably safe for the employees of the C. P. R., in the usual operations of the road? A. We think not.

3. Was the plaintiff, having regard to all the circumstances, in his method of arranging the gear for coupling the cars, acting according to good and proper practice? A. Not having received Circular No. 4, we think he acted to the best of his knowledge.

4. If not, wherein did he err?

5. Was the plaintiff injured in consequence of any defect in the makeup of the car? A. Yes, in our opinion we think he was.

6. If he was so injured state everything which you find to be wrong. A. The car in question lacked the ladder on end of car and long lever equipment used by C. P. R., in which company he was employed.

7. Could the plaintiff by the exercise of reasonable care have provided for the coupling of the cars with safety to himself? A. In our opinion, not under the circumstances.

8. Do you find negligence as to the matters in dispute?

(a) In the C. P. R.

(b) In the plaintiff

(c) Or, in both of them?

9. If so, state briefly what was the negligence in each case.

10. If the plaintiff is entitled to damages, state how much.

The jury have agreed on \$6,000 for damages for plaintiff."

Upon the answers judgment was entered for the plaintiff for \$6,000.

The appeal to the Court of Appeal was heard by HON. SIR CHARLES MOSS, C.J.O., HON. MR. JUSTICE GARROW, HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MEREDITH, and HON. MR. JUSTICE MAGEE.

I. F. Hellmuth, K.C., and Angus MacMurchy, K.C., for the defendants, contended that the plaintiff was not entitled to recover damages against the defendants, that if entitled to any judgment the damages should be limited to the amount recoverable under the Workmen's Compensation for Injuries Act, and that in any event the damages awarded were excessive.

A. E. H. Creswicke, K.C., and Christopher C. Robinson, for the plaintiff, contra.

HON. SIR CHARLES MOSS, C.J.O.:—Upon all the facts disclosed in evidence, and having regard to the circumstances under which the plaintiff met with the injury, I think that if I had tried the case without a jury I should have had no hesitation in holding that the plaintiff had not succeeded in fastening liability upon the defendants. But the case having been submitted to the jury, and their answers to the questions being now before us, there arise for consideration the questions (a) whether there was evidence proper to submit to the jury upon the questions of negligence on the part of the defendants, and if so (b) whether upon the answers judgment should not have been entered for the defendants.

The plaintiff, a young man 22 or 23 years of age, who had been for over 5 years in the employment of the Canadian Express Company, but in what capacity does not appear, though it may be inferred that it was work in connection with railways; and was subsequently employed by the Grand

Trunk Railway Co., as a brakeman for 6 months, entered the defendants' employment as a spare brakeman on the 20th of August, 1910, and continued in that capacity, though not engaged all the time in actual work, until the date of the accident on the 18th of March, 1911. On that day he was engaged as brakeman on a freight train with the box-freight car in question as one of the cars. At Bolton Junction it was necessary to detach a car which was to be left there, and it was cut out by means of a running shunt. After performing that and some other operations, the next step was to unite the remainder of the cars which were to go on to Toronto Junction. The car in question—called the Wabash car—was to couple with a car some distance from it on the line. The plaintiff, as his duty required, went upon the roof to signal the engineer to back down to the other car. When the engine was moving the Wabash car down towards the other car, the plaintiff according to his testimony observed that the coupler on it was closed—that is that the knuckle was not in a position to effect a coupling with the Wabash car unless the knuckle or its coupler, which was also closed, was opened.

In order to open this knuckle, the plaintiff went down the ladder on the side of the Wabash car near the end which was approaching the other car, with the intention of getting hold of the lever or coupler-rod by which the knuckle was opened or closed, and by lifting it thereby open the knuckle so as to receive the coupler of the other car. He went to the bottom step, and with his left foot resting on it, and holding on to the lowest rung of the ladder with his left hand, and with his right foot hanging down and swinging in the air, he endeavoured to reach around the end of the car to the lever or coupler-rod. This lever was connected with the top of the coupler, with the rod projecting towards the side of the car on which the plaintiff was. While in this position, the car, moving at the rate of about 7 miles an hour, passed over a crossing of two tracks and the jar caused his foot to slip from the bottom step, and he fell with his arm under the wheels. In his evidence he said that the lever-rod only projected some 15 or 16 inches from the coupler, which was about 4 feet from the side of the car, so that end was about 32 or 33 inches from the side of the car where he was. He further said that the bottom step was about 11 inches in width, and was loosely and unsecurely fastened to the bot-

tom timber of the car, besides not being under the ladder but to one side of it, that side which was the furthest from the end of the car. In all these respects the testimony adduced by the defendants amply and satisfactorily displaced the plaintiff's contentions. But as the case stood at the end of the plaintiff's case, the learned chancellor could not have withdrawn it from the jury if the defendants' negligence rested upon proof of these facts. It was admitted that the Wabash car had not ladders on the ends, as required by section 264 (5) of the Railway Act. The plaintiff, in examination-in-chief, stated that had there been a ladder at the end of the car, he would have gone down it, and endeavoured to make the coupling. But on cross-examination he admitted that it was not good railway practice to go down between the ends of two cars to make a coupling when the car was in motion, but he said you see it done every day. It is manifest that such a practice is not only dangerous, but is directly opposed to the policy of the law as declared by sec. 264 (c) of the Act. He also suggested that if the ladder had been at the end he might have saved himself from falling, by catching it, but it is difficult to suppose that he could have seriously believed that that was one of the purposes for which a ladder is required on each end of a car. It was not, however, proved or admitted during the plaintiff's case that the car was not the property of the defendants. And assuming it to have been the defendants' property there were the questions whether it was fitted with couplers and ladders as required by sec. 264, and whether the failure to provide them was the cause of the accident, or whether it was due to the plaintiff's own want of care or failure to observe the usual and proper modes of making the coupling. The plaintiff admitted that the proper course would have been to signal the engine-driver to stop, and then get down and make the coupling from the ground, which he could have done. He excused himself by saying that he was on the fireman's side of the car and that the engine-driver was not looking and so he (the plaintiff) could not give any signal.

Upon the whole, although scanty, there was enough at the close of the plaintiff's case to justify the refusal to enter judgment for the plaintiff. But at the close of the whole case, when it had been proved, and indeed admitted, that the car was not the defendants' property, but was owned by the Wabash, or some other company, other questions arose as to the

liability of the defendants for the failure of this car to comply with all the requirements of sec. 264, applicable to couplers and ladders on box freight cars. The car had been received in the ordinary course of the obligation to interchange traffic, imposed by sec. 317 of the Railway Act. It had been inspected in due course and passed in accordance with the ordinary practice, by inspectors whose competency was not questioned. Many hundreds of box freight cars without ladders on each end are received and passed daily, entering Canada from the United States. It is shewn that there is no rule, statutory or otherwise, requiring that there shall be ladders on the ends as well as on the sides of box freight cars used on railways operated in the United States. The car was provided with automatic couplers, but the complaint is as to the length of the lever, or coupling-rod. There is no express provision in the Railway Act prescribing the length of the lever, but the testimony for the defendants shewed that the end of the lever on the car extended to within 15 or 16 inches of the side, instead of 32 or 33 inches as the plaintiff stated. The modern Canadian lever is made to extend out to the side, or to within at least 8 inches; but cars from the United States with the end of the lever 15 or 16 inches from the side are admitted and passed in the usual and ordinary course of inspection. Unless the provisions of sec. 264 apply, there appears to be no statutory or other rule against the transport of foreign box freight cars, although they do not comply in every respect with the Railway Act.

Section 264 (1) enacts that "all companies shall provide and cause to be used on all trains, modern efficient apparatus, appliances and means: (c) to securely couple and connect the cars composing the trains, and to attach the engine to such train with couplers which couple automatically by impact, and which can be uncoupled without the necessity of men going in between the ends of the cars." Assuming the expression "and cause to be used" to comprehend foreign cars in transport over the defendants' lines, the car in question was not open to objection for any defect in the above mentioned respects.

Sub-section (5) enacts that "all box freight cars of the company shall for the security of the employees be equipped with (a) outside ladders on two of the diagonally opposite ends and sides of each car projecting below the frame of the car with one step or ladder below the frame, the ladders

being placed close to the ends and sides to which they are attached." The car in question had not ladders on the ends, but it was not a car "of the company." There is a distinction drawn between the couplers to be used on all trains, and the equipment of box freight cars with ladders. The obligation with regard to the latter is confined to cars of the company. The car was, therefore, not in contravention of the sub-section. Even if the contrary were the case, it is clear that their absence in no way contributed to the accident which befell the plaintiff. I think that upon the whole case the jury should have been told that no case appeared upon which they could reasonably find that the defendants were negligent, and that no case of liability had been made out; and that the action should have been dismissed.

Assuming, however, that it was proper to submit the case to the jury, is the plaintiff entitled to judgment upon the answers returned to the questions? It is to be observed in the first place that the jury failed to return answers to the very pointed and material question on the head of negligence contained in No. 8. But they answer the very general question No. 2: "Was the car and its fittings reasonably safe for the employees of the C. P. R. in the usual operations of the road?" which is not directly pointed at the alleged defects leading to the injury, and a negative answer to which is not a finding of negligence on the part of the defendants.

The answers to questions 4 and 5 bear more directly on the question. They attribute the plaintiff's injury to the fact that the car in question lacked the ladder on the end of the car, and the long lever attachment used by the defendants in their cars. But there is no evidence upon which a jury could reasonably find that these alleged defects were the proximate cause of the accident. The plaintiff was endeavouring by using the side ladder not as a means of descending the ladder to the ground and there effecting the coupling as he admits was the proper course, but for the purpose of enabling him by using the lowest step as a foothold and crouching with his body in a strained and awkward position to effect the coupling, without stopping the car or getting down to the ground. The position was admittedly an improper, and certainly a very dangerous, one not authorized to be taken. The method adopted by the plaintiff to endeavour to effect the coupling was the very one most

calculated to expose him to danger and risk of injury. And there is no evidence to justify the answer of the jury to the 7th question, an answer which in its terms is inconclusive and unsatisfactory. There were no "circumstances" to prevent the plaintiff from adopting the perfectly safe course which he admits he might have done.

Having regard to the evidence in the case, I do not think the answers sufficient to support the judgment entered for the plaintiff, and I think, that notwithstanding them, judgment should have been entered dismissing the action.

The appeal should be allowed, and the action dismissed, with costs if exacted.

HON. MR. JUSTICE GARROW and HON. MR. JUSTICE MACLAREN, agreed.

HON. MR. JUSTICE MEREDITH:—A good deal that has been said and done in this case seems to me to have quite missed the mark which should have been arrived at; for instance all of that branch of it which deals with the requirements of the statute law regarding ladders at the ends of "box freight cars." It can make no difference whether there was any such requirement in respect of the "Wabash" car, from which the plaintiff fell, or if so, whether that obligation was imposed upon the company that owned the car, or upon the company which was using it in the carriage of their freight, or upon the defendant company which had received and was forwarding it as interchanged freight only, if, as I think, it is incontrovertible that the ladder was not required to be provided for the work in which the plaintiff was engaged when he fell and was hurt, but on the contrary that if he had made use of any such ladder for such a purpose he would have misused it contrary to the provisions of the enactment in question, against the wishes and interests of his masters, against his own interests, and against the first instincts of all animal's self-preservation. If he had fallen from such a ladder as he did from the one in question, his life, not only one hand, would have paid the penalty.

It is quite obvious to anyone who has not had, as the plaintiff had, six years' experience in railway matters as a brakesman and otherwise, that it is dangerous to go between cars of any train, and extremely so if they are in motion; and it is equally obvious that that risk should not be taken in any

case in which it can reasonably be avoided; quite obvious that it is not only against the interests of him who does it, of his relatives and friends, and of his employers, as well as against the public interests, that risk of life or limb, should be undertaken when there is no occasion for it.

As to his experience, he tells of it in these words:—

“Q. You have had no experience in railway matters before you went into the employ of the C. P. R. A. Yes, sir.

Q. To what extent? What was your experience? A. I had been with the Canadian Express Company for about five or six years and I was with the Grand Trunk as brakeman.

Q. Passenger brakeman or freight? A. Passenger and freight both.

Q. Then your experience up to the time you quit their employ would be about five or six years, would it? A. Yes, about six years.”

In the same section of the Railway Act in which the requirement as to the ladders is contained, it is expressly and plainly required, in the interests and for the safety of just such men as the plaintiff, that automatic couplers “which can be uncoupled without the necessity of men going in between the ends of the cars” shall be provided, and used, upon cars such as that in question. So that, if such couplers are provided, what possible excuse can there be for going between the cars to uncouple them, not to speak of going between them and doing the work on a perpendicular box car ladder, without any sort of reason for not doing that work from without the cars?

It seems to have been thought necessary, by a learned Judge, to say that you cannot have damages for injury to a finger in the closing of a passenger carriage door, merely because the head-light of the engine, which was drawing the train, was not burning when it should have been; and so it seems to me to be necessary to repeat somewhat frequently the observation that one cannot have damages for any negligence which is not the proximate cause of the injury.

So that really this case depends entirely upon the two questions: (1) whether the defendants were guilty of any negligence in respect of the kind of brake which the plaintiff was attempting to uncouple only; and, if so, (2) whether that negligence was, or whether the plaintiff's want of care in whole or in part was, the cause of his injury.

The jury have not found any negligence in the defendants; it would be very hard to see how they could. The question was pointedly put to them. The substance of their findings, in so far as they affect this case, is that the "Wabash" car was "defective" in not having "the ladder on the end of the car and long lever equipment," such as the defendants have upon their own cars; and that in consequence of such defects the plaintiff was injured.

The findings are not very consistent, for, if the ladder which was not provided had been provided, and if the plaintiff had used it, he would have no need of a long lever uncoupling-rod. His testimony is that if there had been a ladder at the end of the car he would have used it in uncoupling. A longer rod might have made the task of uncoupling from the side ladder somewhat easier; but possibly less so from an end ladder; the lengthened rod is to enable doing the work without going between the cars.

But there is no evidence that the uncoupling-rod did not fully comply with the requirements of the statute, and no finding that it did not; how then can the judgment be sustained? And, as I have before mentioned, there is no finding of negligence on the part of the defendants; and, if there had been, there is no evidence whatever to support such a finding; the plaintiff's case seems to me to be hopeless in this respect; indeed it may be that the requirements of the enactment in this respect, are all that the law can require from any company subject to its provisions, whichever company may be the one to which it applies, if it does not apply to more than one of the companies concerned in the making and the movement of the car in question.

In addition to all this, it seems to me to be impossible for any reasonable man to say, conscientiously, that the plaintiff's injury was not caused altogether by his own negligence; and considerably less than that would deprive him of any right to recover.

The statute-law, passed for the especial benefit of persons engaged in car coupling and uncoupling, as a brakesman especially is, shews the impropriety of uncoupling in any manner making it necessary to go between the cars for that purpose. If the plaintiff were a novice complaining of being put at dangerous work without proper instructions, the case might be different; but he was a man of six years' experience "in railway matters;" and is without any sort of excuse

for adopting the extraordinary method which he was employing when injured. I cannot but think it likely to bring legal methods into conflict with the commonest of common sense if it can be lawfully determined that the plaintiff was acting properly in endeavouring to uncouple cars in motion from a ladder on the side of the car, too far, according to his testimony, from the end of it, and, according to the same testimony, with a foot-hold too shallow and not wide enough to get both his feet into, and shaky at that, with a coupler-rod too short to be operated without danger; and while supported by one foot only upon the loose step, and one hand only upon the rung of the ladder next above that in which his foot was, and only about 20 inches apart, and then making an unduly long reach around the end of the car with his right hand to uncouple; when there was absolutely no need of attempting it and when so doing was in the teeth of the interest of everyone as before mentioned, as well as of the enactment already referred to.

It was suggested that the plaintiff should have our sympathy, however unwisely he may have acted, because, it was said, he was taking the risk in his master's interests and for their benefit; the first part of the proposition I assent to, provided, however, that such sympathy does not warp the judgment; the latter part is obviously erroneous; there is no kind of evidence of over-zeal on the plaintiff's part in his masters' service; as I have intimated, he did that which was, and he must have known was, against the interests of everyone because of the danger of it; he knew that everyone's interest required that the uncoupling should be done from the ground without going between the cars and when they were not in motion, and that there was no sort of reason why that course should not be taken; but familiarity with danger breeds contempt of it, and he is not the only man who did not hesitate to take the risk rather than take the additional trouble to stop the train and get down and uncouple and get up again: for, after all, the risk might be undertaken a good many times without a fall, and a good many falls might happen without getting any part of one's body under the wheels; and he is not the only man who is willing to make the trip's work as short as possible and to be home again as soon as possible.

The jury have hedged themselves in, with a shifty answer, from the untrue finding that the plaintiff could not, by the

exercise of reasonable care, have uncoupled the cars in safety: "In our opinion not under the circumstances;" and they quite dodged the question whether that which the plaintiff was trying to do when he fell was "according to good and proper practice," meaning, I suppose, was it a proper method of uncoupling the cars? The jury should have been asked what they meant by "under the circumstances;" if under the circumstances of standing on the ladder as he was and attempting to do the work in that way—if they assume that that was proper—there might be some justification for the answer; but that would be entirely begging the question.

I would allow the appeal and dismiss the action.

HON. MR. JUSTICE MAGEE:—The plaintiff was brakeman on top of a freight car at the rear of a train which was being pushed back to be coupled to another car which was stationary. Both cars had automatic couplers—but in order to couple it is necessary that the knuckle of one or other shall be open. He noticed that both were closed.

The knuckle, according to defendants' witness Hawkes, can be opened by the operating lever of a moving car. To reach the operating lever the plaintiff descended the only ladder at that portion of the car. That was a ladder on the side of the car which appears from the evidence to have been reasonably close to the corner of end.

It is, I think, clear from the evidence that it was customary for brakemen to operate the levers from the ladders while the cars were moving. It had been done only a few moments before by the other brakeman opening the coupler of the adjoining car to make a flying shunt. The conductor says it was quite customary and he would not think of reporting a brakeman for doing it, and had never told anyone not to do it. The general yard-master, called for the defendants, states that the lever can be operated from the side-ladder.

It is sought to draw a distinction between operating the lever on a moving car in order to uncouple, and doing so in order to couple. But the plaintiff states, and he is not contradicted but indeed borne out by other evidence, that he had plenty of time to do what he was going to do and get around to the side out of the way before the cars would couple. Really all he proposed doing was operating the lever on a moving car. Nowhere do I find that to be for-

bidden. It was argued that this was contrary to the defendants' Circular No. 4 of February 15th, 1911, which, however, the jury find the plaintiff not to have had notice of. That circular forbids "all acts familiarly known as taking chances," and it calls attention to accidents which had occurred "solely by carelessness on the part of some employee such as," *inter alia*, "adjusting coupler . . . when cars are in motion." But Mr. Hawkes, the defendants' yard-master, expressly states, as one might expect, that opening the knuckle by the operating lever is not "adjusting the coupler." That circular naturally enough puts "adjusting coupler" in the same category with "turning angle-cock or uncoupling hosebags." All which would have to be done by going between cars on the ground. But the circular is luminous in respect of several operations. Thus, it refers to "accidents from holding on side of car" but only "when passing platform, building or other obstruction known to be close to track." "Kicking cars into sidings," but only where other cars are standing, and "detaching moving cars" without first seeing to the brakes being in order. This last instance impliedly recognises the practice of detaching moving cars if only the brakes are in order. The plaintiff was injured in an operation not a whit more dangerous than those which are here impliedly recognised, and not at all one which involved the danger of going between cars.

But it seems to me that the plaintiff was not warranted in trying to work the lever from the position which he took, that is holding with one hand the very lowest rung of the ladder only 14 inches above the edge of the car, with one foot in the step only 6½ inches below the edge. He does not shew that there would have been any difficulty in reaching the lever while grasping a rung higher up. Mr. Hawkes considers it quite feasible to have done so even from the upper rung, which I would doubt, though it is not contradicted. The plaintiff would seem to have been in fact inviting disaster by attempting to reach the lever while in that attitude. There was no compulsion of any sort upon him to do so either from fear of injury to his employers' property or otherwise. It is simply a case of unnecessary overbalancing so far as appears—and however much one may feel sorry for his injury it cannot, I think, be said to be caused by the defendants' negligence or breach of statutory duty, if there was such duty as to this car of another company.

HON. MR. JUSTICE MIDDLETON.

APRIL 27TH, 1912.

RE FELIX CORR ESTATE.

3 O. W. N.

Executors and Administrators—Roving Commission by Master-in-Ordinary—To Take Evidence in Ireland to find Claimants to Estate—Motion for Costs to be Paid out of Estate.

MIDDLETON, J., refused to grant an order for payment of costs, holding that the motion was vicious in principle and that the Master had proceeded upon an erroneous theory. That it was his duty to allow claimants to present their respective claims as best they could, each at his own risk as to costs, and, if each and all failed to establish a claim, then the fund goes to the Crown, which would recognize any fair claim that might be made out at any time.

Motion by the administrator for an order directing that the costs of any roving commission which might be issued by the Master in Ordinary, or under his direction, to take the evidence of witnesses in Ireland, be paid out of the estate.

J. S. Fullerton, K.C., for the administrators.

J. R. Cartwright, K.C., for the Attorney-General.

G. S. Hodgson, J. G. O'Donoghue, J. Grayson Smith, D. Urquhart and W. M. Brandon, for various other claimants.

HON. MR. JUSTICE MIDDLETON:—It appears that the late Felix Corr died on the 3rd May, 1910, at the age of about 75 years. He had come to Canada when a lad of twenty. He left an estate of between seven and eight thousand dollars. The National Trust Company was appointed administrator, and, not knowing who were the intestate's next of kin, the administrator paid the net balance, \$7,863.40, into Court under the Trustee Relief Act.

By an order of the Hon. Mr. Justice Teetzel, dated 24th October, 1911, the matter was referred to the Master in Ordinary to enquire and report who was the next of kin. Pursuant to this, an advertisement was published and a number of claims were filed.

A quantity of evidence has been taken before the Master. This evidence has not been taken, as one would have expected, in support of the various claims, but rather as if an inquest was being conducted; a great deal of rambling hearsay testimony being admitted, upon the theory that while it was not evidence it might give some clue which could be followed up

by further enquiry. Counsel stated before me that upon this evidence it would be impossible to find any one of the claimants entitled.

At the close of the evidence, according to the Master's certificate, the following took place:

"I now request the solicitors present to state if any of them know of any available evidence from any source which may throw light on the enquiry as to whether Corr left any relatives, whether those relatives are or are not represented by such solicitors, or whether they can by any means in their power further assist me in this enquiry. No one answers, which I announce to take to mean that no further evidence is available in Ontario. It already having been disclosed by the evidence that witnesses may be available in Ireland, I suggest to counsel that though no further evidence can be obtained here I do not feel justified in closing the investigation, in view of the statements by affidavit and *viva voce* that evidence may be found in Ireland, and that I think the administrator would be justified in moving for a commission and asking the Court for leave to pay the expenses (disbursements) of that step out of the funds. I adjourn the matter till the 25th instant, at 11 a.m., so that counsel may consider this suggestion. The Attorney-General states that as at present advised he is opposed to and will oppose a commission, on the ground that the probability of identification of a Felix Corr who might be proved to have left Ireland as indicated in such evidence with the Felix Corr who dies in Toronto is too remote."

No motion has been made for a commission, but the order applied for is sought; and the statement is made that it is intended that the Master in Ordinary himself shall go to Ireland and conduct such enquiries as he sees fit, without the assistance of counsel for any of the claimants. This course is supported by counsel representing some claimants, and is opposed by the Attorney-General and by other counsel.

It appears that there are several men named Felix Corr who left Ireland at different times for America, and the different claimants seek to establish, and could probably establish, relationship between one or other of these men; but the evidence so far taken not only fails to identify the deceased with any of these, but, in some cases at least, makes it reasonably plain that the identity cannot be established.

A picture has been drawn of the intestate in his 75th year, and the evidence which it is sought to take is that of a number of old people resident in Ireland who it is suggested will be able to identify him from this picture.

When one remembers that Corr left Ireland now more than fifty-five years ago, a boy of twenty, the entire worthlessness of the proposed evidence becomes apparent.

Apart from all other objections, I think the motion is vicious in principle, and that the learned Master is proceeding upon an erroneous theory. It is his duty to allow the claimants to present their respective claims as they best can and each at his own risk as to costs, and, if each and all of the claimants fails to establish a claim, then the fund goes to the Crown; and the Crown will no doubt recognise any fair claim that may at any time be made out.

The motion must be dismissed. I think there should be no costs.

COURT OF APPEAL.

APRIL 4TH, 1912.

REX v. BRITNELL.

3 O. W. N. 977; O. L. R.

*Criminal Law — Obscene Books — Selling and Offering for Sale —
"Knowingly"—Question as to—Criminal Code s. 207.*

Defendant was convicted by a police magistrate upon an information charging that in April, 1911, defendant, contrary to law, exposed for sale and sold certain obscene books, tending to corrupt morals, contrary to the form of statute in such case made and provided. A case was reserved for the opinion of the Court of Appeal, on the question, was there evidence upon which defendant might be convicted of selling and of having "knowingly" sold or exposed for sale, obscene books, within section 207 of the Criminal Code?

COURT OF APPEAL held that the evidence shewed that defendant did not "knowingly" sell nor offer for sale the books so sold. Conviction quashed.

Case stated by R. E. Kingsford, a Police Magistrate for Toronto, under sec. 1104 of the Criminal Code.

Defendant was convicted by the magistrate upon an information charging that, in April, 1911, defendant, contrary to law, exposed for sale and sold certain obscene books, tending to corrupt morals, contrary to the form of the statute in such case made and provided.

The question submitted to the Court of Appeal was whether there was evidence upon which to convict defendant of selling and of having knowingly sold or exposed for sale obscene books, within the meaning of sec. 207 of the Criminal Code.

The case in the Court of Appeal was heard by HON. SIR CHARLES MOSS, C.J.O., HON. MR. JUSTICE GARROW, HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MEREDITH and HON. MR. JUSTICE MAGEE.

George Wilkie, for the defendant.

J. R. Cartwright, K.C., and E. Bayly, K.C., for the Crown.

HON. MR. JUSTICE MEREDITH:—The convicted man is a reputable book-seller, who carries on business, in an extensive way, in one of the business centres of Toronto. Although neither his reputation, nor the character and extent of his business, is a reason why he should not be convicted and punished, if guilty, yet they are not things without weight, and very considerable weight, in considering the probabilities of the truth of the charge against him upon the question whether there was any reasonable evidence of guilt adduced against him at the trial, as well as upon the question of fact, with which the Court cannot deal, whether guilty or not guilty.

The charge against him seems to have been a double one in two senses, exposing for sale and selling two different obscene books; but no question is raised in that respect; the conviction seems to have been in accordance with the charge, as if of one offence only.

The offence is one against morality, and one of a despicable character; the maximum punishment of which is two years' imprisonment; and it must be "knowingly" committed "without lawful justification or excuse."

Assuming the books to have been sold, or exposed for sale, and to have been obscene books, which is assuming a good deal in favour of the prosecution, two other essential things must have been proved against the accused before he rightly could have been convicted: (1) that the books were sold or exposed for sale with his knowledge; and (2) that he knew of their obscene character. This is but a reasonable provision of the law; if it were otherwise the lot of a book-seller, however

honest, and anxious to avoid anything like offending morality; and especially hard upon one who carries a stock of quarter of a million volumes, as one of the witnesses thought the accused does.

Neither book was manifestly or notoriously obscene or immoral; and it may be that neither is in that respect better or worse than a great number of books which are freely sold and read everywhere; and there is, I should think, nothing in either of them to make them very attractive to anyone; and the small profit to be derived from their sale is hardly such as would induce a large dealer to conceal them in his cellar, so that he might sell them with less chance of being found out, and to sell them, with the possibility of two years' imprisonment in the penitentiary before his eyes.

There was no sort of evidence of any exposure of them for sale; and there, manifestly, should have been a finding not guilty to that extent, but there was not, on the contrary there seems to have been a conviction in respect of which the penalty imposed was to some extent imposed.

Nor can I think that there was any reasonable evidence of a guilty knowledge on the part of the convicted man of the sale which was made, and which was of one of the books only, or of its obscene character if it really has any.

It is quite plain that in the extensive business of the convicted man the books in question might have been bought and sold without his knowledge; he did not attend to the department in which such books, that is "works of fiction" are sold. He testified that he did not know that there were any such books in his establishment; that he had a year or more before found invoices of them and returned them, because from what he had heard he thought their tendency was suggestive and so did not want to sell them. There is not a word of testimony to the contrary of this; the most that can be said is that if dealing with a man who might be thought untruthful and tricky there were some circumstances of suspicion, a book having been sold and other books having been found in the cellar; things which are not unsatisfactorily explained by the witnesses for the prosecution. But no one, much less a reputable man doing an extensive reputable business, is to be convicted on suspicion merely; when there is no more than that against him a verdict of not guilty should be entered. The statement that from what he had

heard he thought their tendency suggestive, is a good way removed from an admission that he knew they were obscene.

The cases which were referred to on the argument here, were very different from this case; in them the obscene character of the writings was manifest and in some of them it was the author who was prosecuted and who had sold them.

In a case of this character where there may be different opinions as to the immorality of a book, which is being generally sold here and in other countries or another country, it would seem to me to be the better course for those who object to its sale on that ground, to give notice of such objection to such a book-seller as the convicted man is, and to prosecute only if the objection is not heeded. No such book-seller can have any reasonable desire to sell such books as those in question, if they be obscene, for all there is in it for him, at the risk of being branded as a criminal and sent to penitentiary for two years, after first perjuring himself in the hope of escaping conviction.

I would answer the second question in the negative, and direct that the accused be discharged.

HON. MR. JUSTICE MAGEE:—The two questions stated by the police magistrate under the order of the Court for its opinion refer only to section 207 of the Criminal Code, 1906, under which he had professed to convict. That section as amended in 1909 declares that everyone is guilty of an indictable offence “who knowingly without justification or excuse makes, manufactures or sells or exposes for sale or to public view any obscene book or other printed, typewritten or otherwise written matter, or any picture, photograph, model or other object tending to corrupt morals.” In the information laid against this defendant it was charged only that in the month of April, 1911, he “contrary to law exposed for sale and sold certain indecent and obscene books tending to corrupt public morals contrary to the form of a statute in such case made and provided.” It was not charged that he did it either knowingly or without justification or excuse. It was necessary to allege that he did it knowingly to bring it under that section. The information was not amended. He, therefore, was not charged with any criminal offence under that section. The words “contrary to law” and “contrary to the form of the statute” do not make up for the absence of that allegation or knowledge.

In the formal conviction, however, the words "knowingly and without lawful justification or excuse" are inserted in setting out the offence which is otherwise described as in the information, except that the word "morals is substituted for "public morals," and the word "obscene" for "indecent and obscene."

In his statement of the case for this Court, the learned police magistrate says: "The defendant elected to be tried summarily and pleaded not guilty. After hearing evidence I was of the opinion that the charge was proved and accordingly convicted the defendant, being satisfied that the books were obscene, and that the defendant knew that they were on sale in his establishment." It is not specifically stated whether or not the police magistrate was satisfied that the defendant knew of the books being obscene, and we are as to that left to the inference to be drawn from the fact that he made the conviction. In his reasons for his decision given at the time he said "the section of the Code under which this prosecution is brought is 207."

It would, therefore, appear that the defendant was convicted of an offence with which he was not charged and for which he had not consented to be tried summarily.

As the charge was laid "*contre formam statuti*" and was dealt with under section 207, and the questions propounded refer only to that section, it is unnecessary to consider how far at common law a book-seller charged with selling and publishing an obscene libel sold by his clerk in the course of his business could shelter himself by his want of knowledge of the sale, or of the contents, or how far either must be brought home to him.

Dealing then with the case as one under section 207, there must be shewn knowledge of the sale or exposure for sale, and also knowledge of the character of the book. That the latter must be shewn was held by this Court in *Rex v. Beaver* (1905), 9 O. L. R. 418. The former is also manifestly necessary. An auctioneer selling a library, or shelf or packages of books, might not know what books it contained. Objectionable articles may be made or sold in a factory or shop; and, while the statute would be futile if the proprietor could escape because they were not made or sold directly by himself but by his employees, though with his knowledge, it might also cause injustice if he could be

punished because the making or selling was done for his benefit by his employees, though without his knowledge or consent, or even against his orders.

The only books specifically referred to in the evidence are three recent novels, which for brevity I may refer to as X, Y. and Z. There were, indeed, other books found along with these three in the cellar of the defendants' shop, but the police magistrate does not name them, and merely says some of them were of the same type and some of them he had looked through sufficiently to see that they all were more or less within the scope of the test of obscenity.

Apart from evidence as to the character of the three books, X, Y and Z, the prosecution contented itself with proving that a copy of Y had been bought on 6th April at defendant's shop from a clerk who brought it from the cellar, and that on 8th April a police inspector went to the shop and there saw the defendant, who said he had not a copy of X or Y, but the inspector says, "On searching, we found," in a box in the cellar, 11 copies of X and 13 of Y, besides other books, including one or more copies of Z, and that in the defendant's presence his clerk said he had been selling the book Y and he thought the defendant knew it. It is not stated whether the defendant made any remark thereupon. Indeed, it is not said that he heard it. He was not asked about it when called in his own defence, and he did not refer to it. It is not shewn that any of the public or customers were ever admitted to the cellar. There was, therefore, no evidence of exposure of any of the books for sale, and only proof of a sale of one copy of one book, Y, by the clerk, and no proof of the defendant's knowledge of the contents of any of the books. Z and the other unnamed books are not further spoken of and may be left out of consideration. For the defence, the defendant himself and four of his clerks gave evidence. It appears that his stock contains 150,000 to 250,000 books, of which 4,000 to 7,000 are kept in the cellar in stock—a clerk says the whole place is full of books, and another that he "put the boxes of books down the cellar, and especially as to Christmas time there was not room for as much stock." The defendant says that in the cellar he has in stock a theological library, and cook-books and other books that he has not room for in the shop. One department of the business is that of dealing in old or antiquarian books.

One of his clerks, Appleton, who states that he looks after the sale of the new books, says that X came out in 1907, "and was sold by other dealers here before we had it." "We sold a great many copies till lately, and now we would not sell more than one a month or so. The defendant, himself, testified that he did sell them when they first came out, but "a year or more ago" he found in the invoices a shipment of X and Y, and he returned the books, as from what he heard he thought the tendency of the books was suggestive, and so did not want to sell them; and he did not know when the police magistrate asked him about them that he had a copy of either, and he had not read X nor Y" nor such books." A clerk also testifies that a year ago or so "the defendant returned a shipment containing X and Y" because they were not, I think, the class of books he desired to sell." Even if we take these statements as going for enough to shew that the defendant knew that the books were obscene or such as tended to corrupt morals, it is evident that there is here no proof of a sale with his concurrence after he had learned of the objectionable character of the books. Then it appears from the evidence of Appleton, who has charge of the sale of the new books, that "a year ago we got some 25 copies of each of these two books" X. and Y., and "those found by the police were the remainder of that order." The invoice containing Y. seems to have been produced by the witness before the Police Magistrate, but is not among the papers sent to this Court, and the exact date of it does not further appear. Appleton says: "Defendant probably did not know I had ordered these books, as I am in charge of that branch." Another clerk says, "the defendant is at the office in rear and does not know what new books are in stock. Another says: "The whole place is full of books, 250,000 I would think. Appleton and I are in charge of the front of the shop. Defendant is at the office in rear and looks after the old books . . . Defendant does not know just what books we have bought, nor all we have in stock." Another clerk, Congdon, who says he is in charge of the antiquarian books, says: "The defendant also looks after that department, and defendant does not know what new books are in stock." The defendant, himself, says: "I am at the back of the shop where the branches of the business I look after are situated: I do not attend to the new novels at all." He says, "that

the clerk who ordered the last copies of these two books was in his employ when he returned the shipment, but he only remembered telling Congdon of having sent the shipment back, and he, Congdon, would have nothing to do with ordering these books—they would likely be ordered by Appleton.”

Bearing in mind the extent of the defendant's business, and the fact that the prosecution only proved one sale, and that by a clerk, of one book, without shewing that the defendant had any knowledge of its contents, can it be said that this evidence given for the defence affirmatively establishes knowledge by the defendant that this small order for these books had been given by his clerk after he himself had sent back a shipment of these very books on account of their character? It may be said that even taking the evidence for the defence, it is not absolutely clear that the defendant did not know of his clerk's order, whether at the time or afterwards, or of the receipt of the books thereunder, even though he thought they had all been sold; but it was for the prosecution to establish knowledge, not for him to shew want of knowledge; and, if the prosecution had had doubts upon the subject, it could have been cleared up by cross-examination. That not having been done, there was, in my opinion, failure of proof of knowledge of the sale, even in the sense of implied or tacit authority or consent to it; and, therefore, the second question should be answered in the negative.

It is unnecessary to answer the first question, as it becomes merely academic when the second is answered in the negative. No specific parts of any of the books have been referred to in the information, the conviction, the evidence or in the argument. The statement by the Police Inspector as to the contents of X. and Y. was conceded to be at best inaccurate. No particulars seem to have been asked for by the defence, or delivered. The result would be that it would be necessary for the Court to peruse the books seized to see if it could discover any objectionable page, phrase or sentiment, before it could answer the question propounded. In a sense this would be to ask the Court to be accuser instead of Judge. It is a course which should not again be adopted.

The defendant, on the evidence, should, in my opinion, have been acquitted, and the conviction should be declared invalid.

HON. MR. JUSTICE RIDDELL.

APRIL 4TH, 1912.

HAMILTON ASSIZES.

MERCANTILE TRUST CO. v. CANADA STEEL CO.

3 O. W. N. 980.

*Negligence—Master and Servant—Dangerous Work—Warning —
Lack of Proper Appliances—Prohibited Acts—Inadvertence —
Contributory Negligence—Not Expressly Found by Jury.*

An action by plaintiffs, administrators of a deceased Italian labourer, to recover damages for his death while working at the bottom of a vertical cylinder being erected by defendants as part of a blast furnace being built by them, by reason of a half brick falling on his head, resulting in his death. The jury found in answer to questions that deceased had been warned not to cross under the shaft, that he was not in his proper place, that he knew the danger and that had he been in his proper place he would not have been injured.

RIDDELL, J., dismissed the action with costs.

An action brought by the administrators of a deceased Italian labourer for damages for negligence resulting in his death.

A. M. Lewis, for the plaintiffs.

J. Nesbitt, K.C., for the defendants.

HON. MR. JUSTICE RIDDELL:—The defendants were building a blast furnace—this consisted of a steel jacket in the form of what may with sufficient accuracy be described as a vertical cylinder. This jacket was over 60 feet high, and was being lined with firebrick at the time of the accident. The lining was effected in this way—beginning at the bottom with the firebrick, when the lining had been inserted to a certain height a new floor was put in at a height of 4 feet 6 inches above the bottom floor and from this another ring of firebrick was put in place—then another floor was put in 4 feet 6 inches above the second floor and so on, a new floor being made at each 4 feet 6 inches. In order to permit of the firebrick, fireclay, etc., being sent up to the bricklayers a square shaft was inserted running from the bottom to the floor upon which operations were being carried on—this shaft could not be put in the centre, as there required to be at that place a rod from which as a centre the workmen could carry a cord which being carried around kept the inside of the

brick circular. This shaft was built at one side of the centre, and up the shaft came the tubs containing the materials for the bricklayers.

The operations above being carried on in a contracted space, it is obvious that there was always danger of some substance, brick, etc., falling down the shaft—and indeed it was to be feared that some substance might fall from the tubs in their ascent as they sometimes oscillated, struck the shoulder of the shaft, etc.

The deceased was working at the bottom of the shaft when a portion of a brick fell down the shaft and inflicted such injuries that he died shortly after.

An action was brought on behalf of the widow and children of the deceased, as well as in behalf of the administrators (for doctor's bill).

At the trial before me at Hamilton it appeared that the brick which caused the injury had been thrown down on the platform or floor by a bricklayer and rolling over and over at length reached the shaft and so fell down.

It was contended that the employers should have had one or other of two appliances to prevent the possibility of such an occurrence: 1 a pair of butterfly valves level with the floor which would be shut at all times except when a tub was passing the floor. This the witnesses for the defence prove to be impracticable—and the jury have negatived the proposition of the plaintiff.

2 A continuation of the sides of the shaft up beyond the level of the floor or platform. This it was said would be very inconvenient and in any case it would not prevent the falling of material from ascending tubs. The jury found that the accident would not have happened had the appliance been present, but were unable to agree whether the absence of it was a defect.

It appeared in evidence that the foreman recognizing the danger of material falling down the shaft directed the deceased when he first was put on the job, to keep from under the shaft—the workman said that he had been on the job before and would stand on one side. At the side there was a small platform built either by himself or by another for him to stand upon; and this is where he should have stood, there being no necessity for his being under the shaft

at all. Moreover very shortly before the accident a fellow-workman had seen him crossing under the shaft and had warned him of the danger. This same workman said that occasionally he himself went under the shaft, but that this was forbidden and he knew quite well how dangerous it was and took the risk.

The jury found in answer to questions that these warnings were given, that the deceased was not in his proper place, that he knew the danger, and that had he been in his proper place, he would not have been injured.

I relieved the jury from further answering.

It is obvious that unless the answers to the later questions are sufficient to dispose of the case there should be a new trial—it is not enough that a suggested appliance would have prevented the accident, if the absence of the appliance is not a defect.

But where the questions answered are sufficient to dispose of the case there is no need of further proceedings.

Findlay v. Hamilton Electric Light & Cataract Power Co., 11 O. W. R. 48, discussed in *D'Aoust v. Bissett* (1909), 13 O. W. R. 1115.

Dixon v. Ross (1912), 1 D. L. R. 17 (Nova Scotia), and here I think such is the case.

I have again considered the law and can arrive at no other conclusion than that at which I arrived in *D'Aoust v. Bissett*, followed as it has been in the King's Bench Divisional Court recently. (*King v. Northern Navigation Co.*, 20 O. W. R. 220, 24 O. L. R. 643.)

The very recent case of *Barnes v. Nunnery Colliery Co.*, [1912] A. C. 44, shews that even under the Imperial Act more favourable to the workman as it is than our own, there can be no recovery where the accident took place when the workman was doing a prohibited act. There a boy of 17, a "clamber" in a coal mine, going to his work, got into one of a series of tubs carried by an endless rope, that he might ride instead of walking. He had travelled in the tub about half a mile when his head came in contact with the roof of the mine and he was killed—the evidence shewed that it was quite a common practice for boys to ride in the tubs in order to get to their work but that this practice was forbidden.

The Court (the House of Lords), held there could be no recovery.

In the present case as in that just mentioned that the dangerous act while prohibited in form was really "winked at" as was the case in *Robertson v. Allan* (1908), 77 L. J. K. B. 1072.

In addition to the cases already mentioned the following are in point: *Deyo v. Kingston & Pembroke Rw. Co.*, 8 O. L. R. 588, 4 O. W. R. 182; *Markle v. Simpson*, 9 O. W. R. 436, 10 O. W. R. 9; *Grand Trunk Rw. Co. v. Birkett*, 35 S. C. R. 296; *Best v. London and South Western Rw. Co.*, [1907] A. C. 209; *Brice v. Edward Lloyd, Ltd.*, [1909] 2 K. B. 804; *Mammelito v. Page-Hersey Co.* (1908), 13 O. W. R. 109.

It is strongly urged by Mr. Lewis that all the default of the deceased might be due to inadvertence and that in the absence of an express finding of contributory negligence the plaintiffs might still recover.

This argument is completely met by a decision of the Chancery Divisional Court sustaining a judgment of Mr. Justice Teetzel at the trial dismissing the action upon the plaintiffs' own shewing. In that case (I was of counsel both at the trial and in the Divisional Court) the deceased's work was to feed blocks to a circular saw wholly unguarded. The blocks were placed upon a car which itself ran to the saw upon a tramway—the car was so arranged that whenever any weight was placed upon it, it inevitably ran to the saw. By reason of the arrangement of blocks, etc., there was great likelihood of the person feeding putting his foot upon the car and being carried at once to the saw—and the deceased was warned accordingly by the foreman not to put his foot upon the car. After working for some time in safety he was observed by a fellow workman to put his foot upon the car—the anticipated result occurred; he was carried to the saw and cut in two. It was perfectly apparent that his act was by pure inadvertence—a mere temporary forgetfulness when he was busy at his master's work.

The case was tried by Mr. Justice Teetzel without a jury at Lindsay, June 2nd and 3rd, 1904, and that learned Judge held that the fact that the act of the deceased was by inadvertence did not relieve his representative, and dismissed the

action. The Divisional Court (the Chancellr, Meredith and Magee, JJ.) dismissed an appeal from this judgment December 12th, 1904.

This case is in my humble judgment good law, and I follow it.

Wilson v. Davies (1907), 10 O. W. R. 315, in the Court of Appeal may also, in some respects, be in point.

The action will be dismissed with costs.

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COURT OF APPEAL.

APRIL 29TH, 1912.

RE WEST LORNE SCRUTINY:

3 O. W. N. : O. L. R. .

Elections—Municipal—Local Option By-law—Voting on—Votes of Non-resident Tenants—Finality of Certified Voters' List—Voters' Lists Act (1907) s. 24—Right of County Judge to Enquire into how Ballots were Marked—Municipal Act (1903) ss. 86, 148, 198, 199, 200, 351, 369—Liquor License Act, R. S. O. (1897) c. 245, s. 141.

On a scrutiny of votes on a local option by-law, the County Judge ruled that he was entitled to go behind the certified voters' list and enquire into the right to vote of persons whose names were upon the list upon which the voting took place. He found that five tenants had illegally voted, as they had not resided within the municipality for one month previous to the voting as required by the Municipal Act (1903) s. 86. He deducted these five votes from the votes polled in favour of the by-law, and found that the by-law had not been approved of by the three-fifth majority required by the Municipal Act (1903) s. 369.

MIDDLETON J., 19 O. W. R. 231, 23 O. L. R. 598, 2 O. W. N. 1038, made an order prohibiting the County Judge from certifying that the by-law had not been approved until he had made enquiry as to how the five tenants had voted and directing him to enter upon such enquiry to ascertain the facts. *Dictum* of Garrow, J.A., in *Ellis & Renfrew*, 18 O. W. R. 703 at 707, 23 O. L. R. 427 at 435, followed.

DIVISIONAL COURT, 19 O. W. R. 967, 3 O. W. N. 25, could enter no judgment, owing to a difference of opinion, and suggested that the appeal be re-heard by another Divisional Court. On the second hearing it was *held*, 20 O. W. R. 738; 3 O. W. N. 422, that the Municipal Act (1903), s. 200, clearly protects any person from being required to state for whom or how he voted, although he may have had no legal right to vote. *Re Lincoln Election Ptition*, 4 A. R. 206; *Re Haldimand Election Case*, 1 O. E. C. 529; *Re ex rel. Ivison v. Irwin*, 4 O. L. R. 192, 1 O. W. R. 371, and *Re Orangeville*, 15 O. W. R. 564, 20 O. L. R. 476, followed. That the vote of a tenant, whose name was on the certified voters' list, who was not in fact a resident of the municipality when the list was certified and who never afterwards became a resident therein, was good, under the Voters' Lists Act (1907), s. 24 (1), notwithstanding s. 86 of the Municipal Act, and although it leads to the incongruous result that the vote of tenant A., who may have become a non-resident a month or more before

the list was certified and remained a non-resident until after the election, is good, while the vote of tenant B., who did not become a non-resident until a day before the election would be illegal, under the Voters' Lists Act (1907), s. 24 (2). *Re Saltfleet*, 11 O. W. R. 356, 545, 16 O. L. R. 293, followed. *Ellis & Renfrew*, 18 O. W. R. 703 at 707, 23 O. L. R. 427 at 435, *dictum* of Garrow, J.A., not approved. *Re West Lorne Scrutiny*, 19 O. W. R. 967 at 973, 974, reasons of Riddell, J., approved.

COURT OF APPEAL reversed judgment of Divisional Court and left the County Judge at liberty to certify the result of his scrutiny to the council. By-law declared not carried. No costs of any of the proceedings.

MACLAREN and MEREDITH, JJ.A., *dissenting*.

An appeal by D. H. Mehring, from a judgment of Divisional Court, 20 O. W. R. 738, allowing an appeal from a judgment of HON. MR. JUSTICE MIDDLETON, 19 O. W. R. 231, 23 O. L. R. 598, 2 O. W. N. 1038. The facts are fully stated in the previous reports.

The appeal to Court of Appeal was heard by HON. SIR CHAS. MOSS, C.J.O., HON. MR. JUSTICE GARROW, HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MEREDITH and HON. MR. JUSTICE MAGEE.

C. St C. Leitch and J. M. Ferguson, for D. H. Mehring.
W. E. Raney, K.C., and J. Hales, for Dugald McPherson.

HON. SIR CHARLES MOSS, C.J.O.:—This case furnishes another example of the difficulty and confusion which so often arise from the adoption by the Legislature of the device of incorporating by reference some of the provisions of one statute into the body of another statute which is being enacted. The disadvantages of this mode of legislation have been remarked upon in England and this country, and it has been truly said that this procedure makes the interpretation of modern Acts of Parliament a very difficult and sometimes doubtful matter. See *Knill v. Towse* (1889), 24 Q. B. D. 186, 196, where the question was not unlike in some respects the question involved in this case. And a legislative committee in England is reported to have described legislation by reference as making an Act so ambiguous, so obscure and so difficult that the Judges themselves can hardly assign a meaning to it, and the ordinary citizen cannot understand it without legal advice. Craies' edition of *Hardcastle on Statutory Law* (1907), p. 26.

It is scarcely to be wondered at, therefore, that unanimity of opinion is not to be found expressed in many of the deci-

sions in which the questions arising on this appeal or some of them have been discussed.

The first question raised in the appeal has been much debated and has given rise to much divergence of opinion among the Judges who have had it under consideration in other cases. As stated by Teetzel, J., in his opinion delivered while sitting as a member of the Divisional Court, whose judgment is now in appeal, the question is: whether upon a scrutiny under the Municipal Act the County Judge may declare void and deduct from the result the vote of a tenant whose name was upon the certified voters' list, but who was not in fact a resident of the municipality when the list was certified and who never afterwards became a resident therein.

This question affects 4 votes polled, and if answered in the negative as it was by the Divisional Court, practically ends any necessity for discussion as to the fate of the one other vote polled, which is in question here.

In holding that the 4 votes in question were not open to attack upon the scrutiny the Divisional Court considered itself bound so to hold by the decision of another Divisional Court in *Re Saltfleet*, 16 O. L. R. 293, though it had been subjected to adverse comment in some other cases.

In *In re Orangeville Local Option By-law*, 20 O. L. R. 476, Meredith, C.J., considered the question of the jurisdiction of the Judge to enter upon an inquiry as to the right to vote of any one who has deposited his ballot paper, and declared his own opinion to be against the exercise of such jurisdiction. He expressed the opinion that the inquiry is limited to scrutiny of the ballot papers, and differs only from a recount in that the Judge is not limited to dealing with the ballot papers *ex facie*, but may take evidence in the same way as may be done upon a trial of the validity of an election of a member of a municipal council for the purpose of determining whether any ballot paper ought or ought not to be counted.

With deference, I am unable to follow the distinction drawn between a scrutiny of ballot papers and a scrutiny of votes, bearing in mind the object with which the scrutiny is entered upon. The Judge is to determine and certify whether the majority of votes given is for or against the by-law. He is not merely as in the case of a recount under sec. 189, to count up the votes given upon the ballot papers not rejected and make up a written statement of the num-

ber of votes given for each candidate and of the number of ballot papers rejected and not counted by him and certify the result to the returning officer. In all this he is acting in a ministerial capacity. In a scrutiny he is acting in a judicial enquiry with the purpose of ascertaining which way in truth and in fact the majority of the votes is given. Light is thrown upon this view by the language of sec. 24 of the Ontario Voters' List Act, which expressly refers to a scrutiny under the Municipal Act as well as to one under the Ontario Election Act. That section declares that "the certified list shall upon a scrutiny under either of these Acts be final and "conclusive . . . except." The exception applies to one scrutiny as much as the other. Then what is the extent of the exception under sub-sec. 2, which is the one with which we are immediately concerned? It applies to persons who subsequently to the list being certified are not or have not been resident either within the municipality to which the list relates or within the electoral district for which the election is held, and who by reason thereof are under the provisions of the Ontario Election Act disentitled to vote.

If this sub-section applies to municipal elections it also applies to voting on by-laws by the express terms of the preceding part which speaks of a scrutiny under the Municipal Act.

So that when conducting a scrutiny under the Municipal Act, reference must be made to the provisions of sec. 24 of the Ontario Voters' List Act in order to ascertain the extent to which the enquiry can proceed. I agree with those who think that scrutiny under sec. 371 is something more comprehensive than a simple recount and that when proceeding with a scrutiny under that section the County Judge has authority to enquire into the question whether any persons who have cast their ballots come within the expected class mentioned in sub-sec. 2 of sec. 24 of the Ontario Voters' List Act.

I am also of opinion that it is competent for the County Judge to declare void the vote of a person who has cast a ballot when it appears that although his name was on the certified list, he was not when it was placed thereon, resident, and has not since become resident within the municipality to which the list relates. Within the very terms of the sub-section, as it appears to me he is not and has not been resident within the municipality subsequently to the list being certified. I am unable to see why any distinction should be

drawn between his case and that of a person who was resident within the municipality when the list was certified, but ceased to be resident subsequently to the list being certified.

The one remaining vote held void by the County Judge was admittedly within the exception of sub-sec. 2. The result should, in my opinion, be that the County Judge's ruling was correct and that his certificate should stand.

The remaining question dealt with by the Divisional Court, is whether if the County Judge upon a scrutiny conducted by him finds that a person whose name was upon the list, but who had no right to vote did vote, such person may be compelled to disclose before the County Judge how he did vote. While the decision of the Divisional Court on the other branches of the case rendered it unnecessary to consider this question so far as the result was concerned, it deemed it of sufficient importance to justify a determination upon it.

Without entering upon any extended discussion, I think it quite sufficient for me to say that I entirely agree with the conclusion of the Divisional Court upon the question as expressed in the opinion of Teetzel, J.

The result upon the whole is that the order of the Divisional Court should be set aside, and that the County Judge should be left at liberty to certify the result of the scrutiny to the council.

But in view of the varying and conflicting opinions and the apparent difficulty in solving the questions at issue, there should be no costs of any of the proceedings.

HON. MR. JUSTICE GARROW:—This is an appeal from the judgment of a Divisional Court reversing an order of Middleton, J., made in the matter of a vote taken in the village of West Lorne upon a Local Option By-law.

After the vote had been taken, one Dameon H. Mehring applied to the County Judge of the county of Elgin for a scrutiny of the ballot papers. The scrutiny was granted, and was proceeding, when one Dugald McPherson applied to Middleton, J., for an order prohibiting the County Judge from entering upon an enquiry as to the right to vote of five persons whose names appeared upon the voters' list and who had voted, but who it was alleged were disqualified, or in the alternative for a mandatory direction to the County Judge to ascertain how these persons had voted.

Middleton, J., agreeing with the County Judge, held, 19 O. W. R. 231; 23 O. L. R. 598; 2 O. W. N. 1038, that these

persons were not entitled to vote, and directed him to enquire and ascertain how they had voted in order to determine whether the majority of the lawful votes given was for or against the by-law.

An appeal from this order was taken and was heard first before the King's Bench Division: see 19 O. W. R. 967; 3 O. W. N. 25, and in consequence of the difference of opinion there expressed reargued before the Exchequer Division: see 20 O. W. R. 738, 3 O. W. N. 422, when the appeal was allowed.

The polling took place on January 2nd, 1911. The voters' list was finally revised and certified on October 28th, 1910. The five persons whose votes are in question were all upon the list as tenants. Four of them had ceased to reside in the municipality before the voters' list was certified. One of them became non-resident afterwards, namely, on December 5th, 1910. The total number of votes polled, including those of the before-mentioned five persons, was 234. The votes for the by-law were 142, and against 92. The learned County Judge proposed to deduct these five votes from the total, leaving as the actual total 229. And he also proposed to deduct the whole of the five votes from the votes cast in favour of the by-law, which would have left 137, or less than the required three-fifths of the proper total, and would have so certified, but for the prohibition granted by Middleton, J.

The Divisional Court was of the opinion, following the *Saltfleet Case*, 16 O. L. R. 293, that the County Judge had no legal authority to disallow the four votes given by the tenants who had ceased to reside in the municipality before the voters' list was certified, and that in that case it was unnecessary to deal with the fifth, who had ceased to so reside thereafter, because the disallowance of that vote would not affect the result. The Court further held that the enquiry directed by Middleton, J., into how a person had voted would be contrary to the provisions of sec. 200 of the Consolidated Municipal Act, 1903.

The questions involved are, therefore, three, namely (1) were the 5 tenants, or any of them, disqualified because they had ceased to reside in the municipality before the voting. (2) Had the County Judge power on a scrutiny held under sec. 369 of the Consolidated Municipal Act, 1903, to disallow such votes, or any of them, and (3) If they were properly

disallowed what should follow—should they be deducted as the County Judge proposes to do, from the affirmative vote, without enquiry, or should there be an enquiry as Middleton, J., seemed to think, and the deductions made as the result of such enquiry.

By sec. 141 (1) of the Liquor License Act, a local option by-law must before being finally passed, be approved by the “electors of the municipality.” And who are such “electors” is determined by sec. 86 of the Consolidated Municipal Act, 1903: We are concerned here only with tenants, and their right to vote, or in other words to be “electors” of the municipality. These are provided for by clause “secondly” of sec. 86, which says “all residents of the municipality who have resided therein for one month next before the election, and who or whose wives are at the date of the election tenants in the municipality.” They must, of course, in addition, be upon the voters’ list used at the election.

Residence alone is not sufficient, nor is being upon the voters’ list without residence sufficient. Both must exist to qualify the tenant voter. And that being so, it is perfectly clear that none of the five was qualified, or entitled to vote on the by-law in question. “The Ontario Voters’ Lists Act, 7 Edw. VII, ch. 4, sec. 24, was relied on as the foundation for a contrary view. The one statute, however, is of as much force and virtue as the other, unless the later one was intended to repeal the earlier, of which there is not the very slightest indication. And both must, therefore, be read together, as in my opinion they can be with perfect harmony, as expressing the law upon the subject. No one disputes the finality of the voters’ list as expressed in sec. 24 of The Voters’ Lists Act. However, disentitled to be upon the list, if a person is upon it and conforms to sec. 86 of the Municipal Act as to residence, such a person’s vote could not, I think, be questioned. It was said in the *Orangeville Case*, 20 O. L. R. 476, at p. 479, by Meredith, C.J., that the only paragraph of sec. 24 of the Voters’ Lists Act, which is applicable to a municipal election or a vote on a by-law, is the first, and that paragraph 2 is applicable only to elections under the Ontario Election Act. I am, with deference, unable to agree with the latter statement. There is nothing in the Election Act requiring a voter to reside in any particular municipality after the voters’ list is made up and certified, but he must continue to reside in the electoral dis-

strict to entitle him to vote at an election to the assembly. The words "within the municipality" followed by "or within the electoral district," would, therefore, make the former words meaningless and unnecessary unless they are held to apply, as in my opinion they do, to municipal elections, and to the disqualifications by reason of non-residence for which the Municipal Act provides.

Clause 2 of sec. 24 should, perhaps, have contained a reference to the Municipal Act as well as to the Ontario Election Act. As it is, its proper construction is, I think, to regard the latter words, "and who by reason thereof are under the provisions of the Ontario Act disentitled to vote," as referring only to the words "or within the electoral district for which the election is held," which immediately precedes them. It is unreasonable to suppose that the Legislature while carefully preserving the provisions as to residence contained in the Election Act intended in such an indirect manner to repeal the very similar provisions as to residence contained in the Municipal Act, affecting as they do every class of voter except a freeholder.

The question, however, in the view I take is not vital, for the real disqualification arises, in my opinion, not under the Voters' Lists Act, so much as under the plain language of sec. 86 of the Municipal Act, which while fully accepting the finality of the voters' list, cannot be ignored as to events subsequently occurring or existing.

The next question is as to the power and authority of a County Judge upon a scrutiny to deduct such votes, a question which has been frequently discussed and upon which divergent views have been from time to time expressed.

The decision of the Divisional Court in the *Saltfleet Case*, 16 O. L. R. 293, seems to mark an epoch. Teetzel, J., before whom the matter first came was of the opinion that the County Judge had no power to question the right of any voter to vote, or to disallow any vote, and that his power was confined to compelling the production before him of the voters' lists and all material used at the election, and hearing evidence as he might consider necessary with reference to the ballots, so that he might ascertain exactly the number of ballots cast for and against respectively, and that he might determine upon something more than the mere ballot itself if necessary as to its validity or invalidity as a ballot. The appeal to the Divisional Court was upon the facts dismissed

with costs. But in the judgments of the learned Chancellor and Magee, J., a larger view was taken of the County Judge's powers, which view has since, though frequently anathematized—see per Anglin, J., in *Re McGrath v. Durham*, 17 O. L. R. 514, per Meredith, C.J., in the *Orangeville Case*, 20 O. L. R. 476, and per Riddell, J., in *Ellis v. Renfrew*, 21 O. L. R. 74, been followed.

The view of the learned Chancellor is set out on p. 302. As will be seen, he regarded the scrutiny in such a case as something more than a simple recount, the extent of it to be measured "by what can be done on inspection of the ballot papers and the ascertainment of what votes are void ex facie, and the scope of investigation contemplated by the exceptions to the finality of the voters' list." Earlier on the same page he had said that a subsequent change of residence which would disqualify may be investigated under sub-clause 2 of sec. 24 of the voters' list Act, but not a subsequent change of status. With a subsequent change of status we have nothing to do here. We are dealing only with the case of non-resident tenants whose names are upon the voters' list, and, with deference, it seems to me to be a matter of perfect indifference when such non-residence began, whether before or after the voters' list was certified, if in fact it continued to exist down to within one month of the election or vote as the case may be. The enquiry in both cases is wholly as to a state of facts existing subsequent to the perfection of the voters' list, and is in no respect in derogation of its finality, the point at which the enquiry in both cases must begin.

I, therefore, agree with the decision in the *Saltfleet Case* as far as it goes with respect to the power of the County Judge to disallow the vote of a tenant because of non-residence arising after the list was certified; but I go further and say that in my opinion no valid distinction can be drawn between that case and the case of the non-resident tenant who was actually non-resident when the list was certified, and afterwards so continued.

I quite agree that a scrutiny is something more than a recount. That it was intended to be something more is clearly made manifest by the circumstance that the ordinary recount provided for in the case of municipal elections by sec. 189 of the Consolidated Municipal Act is also applicable to the case of a vote upon a by-law, that section being one of those introduced by sec. 351, a circumstance it seems to me

which has not always been kept clearly in mind in dealing with the subject. And that section (189) seems to make short work of another matter upon which those who hold the narrower view have occasionally built, namely, that the scrutiny is to be of the ballot papers, which they say is not the equivalent of a scrutiny of the votes. But throughout that section "ballot paper" and "vote" are used indiscriminately as representing and meaning the same thing, in my opinion the only sensible view.

Then as to the third point, what is to be done with the disallowed votes? And as to that, the only question is, should they all be deducted as the learned County Judge thought, from the affirmative votes? Middleton, J., was of the opinion, evidently, in referring the matter back to the learned County Judge, that the voters whose votes were disallowed could be made to disclose in what way they had voted, upon the ground that they were not voters, and, therefore, not entitled to the protection of sec. 200 of the Consolidated Municipal Act. But I am, with deference, unable to accept that view. In the *Orangeville Case*, 20 O. L. R. 476, Meredith, C.J., at p. 483, suggested without determining that in such a case the County Judge should not make the deduction, but simply certify the facts to the Council. That view also seems to me, with deference, to be unsound.

Under sec. 371, the only person who can "determine whether the majority of the votes given is for or against the by-law," is the County Judge. The council could only act on his certificate determining the result one way or the other. The subject is one of much difficulty. In the absence of the ballots themselves it is impossible to arrive at a perfectly satisfactory result, nor, in my opinion, would the result be much more satisfactory if it was possible to examine under oath the voter, who if dishonest, knowing that he could not be found out, could easily inflict further injury upon the side against which he actually voted by pretending that he voted upon that side. In some cases, perhaps, evidence, more or less reliable, might be got as to the habits and associations of the voter, which might raise a presumption as to which way he had probably voted. A hotel-keeper, a bar-tender, or other liquor-seller it might fairly be presumed, would probably vote against such a by-law, while a member of a temperance organization, or one who without being a member was an abstainer in practice, would probably vote the other way.

And yet such evidence could not go very far, for one object of the secret ballot is to protect the voter in the expression of his honest convictions, even where his associations and the company he keeps, and such convictions, do not as must sometimes happen, agree.

Upon the whole, after much consideration I am not prepared to say that the learned County Judge was wrong in proposing to deduct the disallowed votes from the total of those cast in favour of the by-law. That seems to have been for so long the practice that if a change is desired it should come through legislation.

The result is that, making such deduction, the by-law has not received the requisite majority, and the County Judge should certify accordingly.

The appeal should, therefore, to the extent I have indicated be allowed, but under the circumstances there should, I think, be no costs, either here or below.

HON. MR. JUSTICE MEREDITH (*dissenting*):—This case involves the question whether a scrutiny, under section 369 of “The Consolidated Municipal Act, 1903,” is a scrutiny of votes polled, and consequently a controverted election trial; or is, as it purports to be, a scrutiny of “the ballot papers” only.

The question arose in the case of *In re Local Option By-law of the Township of Saltfleet*, 16 O. L. R. 292, in which a Judge had held that the enactment meant no more than it, in plain words, said “a scrutiny of the ballot papers”: but, upon an appeal to a Divisional Court, that ruling appears to have been differed from to some extent, but to just what extent is not made very plain. Boyd, C., dealt with the question in an addendum only to his judgment, in which he intimated that the case had not been very fully argued. Mabee, J., agreed with him without giving any reasons: but Magee, J., dealt with this question at considerable length, and went the full length of holding the scrutiny to be an unlimited scrutiny of the votes polled.

For several reasons I am quite unable to agree with him in that conclusion.

In the first place it is in the teeth of the plain and simple words of the legislation, “a scrutiny of the ballot papers”; and I decline to attribute to the legislative assembly a lack of knowledge of the meaning of such words

under any circumstances, but the more so because when a scrutiny of votes polled has been so meant that representative body has found no difficulty in providing for it in quite appropriate words: see section 76 of "The Ontario Controverted Elections Act," R. S. O. 1897, ch. 11: the words there employed being "a scrutiny of the votes polled at the election." It will be found safer, in all cases, to attribute to the legislature as complete a knowledge of plain English as that which most of us possess.

In the next place, if this be not a scrutiny of the "papers" only, but, in truth, a controverted election trial, then a special tribunal is constituted for the trial of such a case, and, according to the general rule, the finding of such a tribunal is not subject to review elsewhere, unless some provision for appeal or review is made in the legislation, and there is no such provision in any shape or form. I cannot think that any one will seriously contend that the legislature meant that the judgment of a single County Judge, upon such a proceeding, should be final and conclusive as to the validity of any by-law—money or local option—which may be the subject of voting the ballot papers of which are to be so scrutinised. On the other hand, if such general rule is not to apply—and generally the cases seem to have been dealt with as if it did not—then we would have the farce of a costly scrutiny to no binding purpose; a costly scrutiny to be gone over anew in any attack which might be made upon the by-law in the usual way. So that, whichever way it is looked at, it seems hardly possible that reasonable men could have desired such an effect. Whilst, if the scrutiny be restricted to the ballot papers—in the nature of a recount—it would be quite reasonable, and quite in accord with the provisions for a speedy recount, which, by legislation, is now commonly given after all elections.

Again, the proceedings must be commenced within the usual time for beginning recount proceedings, fourteen days after the declaration of the result of the poll; whilst the time limit for motion to quash is, generally speaking, not less than a year. Preparing for a scrutiny of the votes would ordinarily require more time than preparing for attacking the by-law on other grounds, and beside this no provision is made for notice of objections to voters; nor is there anything to indicate, in any manner whatever, that the qualifications of voters, especially to be objected to, or the quali-

fication of every voter who voted, is to be, or may be, inquired into in this hurried fashion: on the contrary the Judge is to proceed upon an "inspection of the ballot papers," not an enquiry into the qualification of voters, and upon such evidence as he may deem necessary, evidence as to ballot papers not as to qualification of voters, which upon a scrutiny of votes polled would not be in the mere discretion of the Judge, but would be such admissible evidence as the parties saw fit to adduce.

And again, the ruling in the *Saltfleet Case* has been frequently questioned, so that hitherto the weight of judicial opinion greatly preponderates against the view that a scrutiny of ballot papers is a scrutiny of the votes polled, involving an enquiry into the qualifications of the voters.

And lastly, even if the words be considered of doubtful import, is a Court of such extensive jurisdiction, and one of such extraordinary power—whether wholly conclusive or wholly inconclusive, as I have before mentioned, to be created on doubtful language?

And, if this is not enough, look at the result: the by-law is to be judicially declared to have been defeated at the poll—with all the binding consequences of such a defeat of a local option by-law at the polls—though in truth it may have been, and in all probability was, carried: an injustice arising wholly from a disregard of the plain words of the legislation; an unfortunate attempt to improve upon well considered legislation: let the scrutiny be, as the legislature has plainly said, of the ballot papers, and you have certainly finality and justice; certainty and finality in the County Judge's scrutiny of the ballot papers, and justice from the ordinary Courts, with the usual rights of appeal, in making the scrutiny of the qualifications of voters, and in such a case as this, setting aside the by-law because of the inconclusive character of the poll; leaving it to the contestants to try it over again if they choose to; which is the only just consequence of an indecisive election poll or race.

Against all these, and other reasons for treating the legislature as if its members knew the meaning of plain words, these things have been urged:—

In the first place it is said that the provision, contained in section 372, giving to the Judge, upon the scrutiny, the like power and authority as those which he has upon the trial of the validity of an election, shews that each is really

an election trial. But there is no warrant for any such contention: the power and authority is expressly limited to matters properly "arising upon the scrutiny." It was necessary to confer power and authority to enable the Judge to prosecute the enquiry and "upon inspecting the ballot papers" to determine, in a summary manner, "whether the majority of the votes given is for or against the by-law," and what shorter or better method could be adopted than in saying that, so far as they are applicable to a scrutiny of ballot papers, the procedure upon an election trial shall be applicable, as this section in effect provides.

Then it is said that the legislature could not have meant a mere recount, because it had, in an earlier section of the Act, provided for a recount in municipal elections: section 189: and had, by another section: section 387, made this section applicable to voting on money and local option by-laws. But in truth that is not so; nor, if it were, would such a consequence necessarily follow. Under section 387, sections 138 to 206, except section 179, are incorporated with the provisions respecting the poll in regard to money by-laws, and local option by-laws are under the local option enactments put in the same category as money by-laws, but those sections are so incorporated only in "so far as they are applicable"; and the rule is that where a special enactment provides for a certain case the provisions of a general enactment covering it also are inapplicable: so that, here, it seems to me to be plain that the provisions of section 369 especially applying to such a by-law, section 189 is inapplicable, and so expressly excluded under the plain words of section 387. And there is abundant reason for that, for money by-laws are by-laws of the most important character, and the provisions of section 369 are of a wider and more protective character than those of section 189; the one is a scrutiny of the ballot papers, the other a recount of the votes only. Upon a scrutiny of the ballot papers the question of the validity of each ballot may be enquired into; a thing of no small importance when the corrupt dealing with ballot papers, even by sworn election officers, has been only too frequently proved in election cases some time ago, is borne in mind.

And lastly, it is said that the legislature has used, elsewhere, the words "ballot papers" and "votes" indiscriminately, and so may be taken to have meant a scrutiny of

the votes polled, and a scrutiny of the widest character respecting such votes, when it has said only that it shall be a scrutiny of ballot papers. Again, I challenge both the accuracy of the statement and the logic of the conclusion if the statement were true. Section 189 is again appealed to; but, instead of that section proving indiscrimination, from the beginning to the end of it it shews a clear discriminating knowledge and expression of the obvious difference between votes polled and ballot papers. The Judge is to examine the ballot papers and recount the votes recorded upon them; and this discrimination is shewn throughout the section, with one possible exception, which appears in sub-section (6), where the words "recount all the votes or ballot papers" are used, but even these words shew a discrimination and would be very exact if the word "or" were "and," because not only is it necessary to count the votes but also to count the ballot papers, unused and rejected, as well as used and become evidence of a vote. If the legislature knew not the difference between a vote and a ballot paper why use both? The error in asserting that the words "ballot paper," as used in section 369, mean vote ought surely to be evident when it is borne in mind that there are unused ballot papers which must be scrutinised and counted as well as used and spoiled ballot papers to be so dealt with; as well as any corruptly substituted or corruptly marked or remarked ballot papers; for the whole subject of ballot papers comes within the scrutiny under section 369 though not within the recount under section 189.

I can, therefore, find no excuse for attributing to the legislature want of knowledge of the meaning of the plain and simple words "ballot papers;" and I venture to assert that no existing enactment gives any sort of colour for doing so.

If this be so then the County Judge had no power to enter upon a scrutiny of the votes in regard to the qualification of the voters, and was rightly prohibited from doing so; and it is quite immaterial that the grounds upon which the order was made were erroneous.

The next question considered by the Divisional Court was whether the voters in question were qualified to vote; but I am at a loss to understand what power there was to deal with such a question in prohibition proceedings. If the County Judge had jurisdiction to enter upon such an en-

quiry, whether he reached a right or a wrong conclusion is surely not a question that can be dealt with in prohibition; prohibition is directed against an usurpation of jurisdiction only: we must not assume the power which would rest only in a Court having appellate jurisdiction over such proceedings; and, as I have before intimated, no appeal is given from the County Judge.

But as a majority of the members of this Court considers that there is power here to consider the question I am bound to accept that view and to express my opinion upon it; and my opinion is that upon this question also the order of the Divisional Court was right, but I would support it also on different grounds.

Whether these voters were qualified or not depends upon section 24 of "The Ontario Voters Act"; 7 Edw. VII. ch. 42.

The names of all of them appeared as duly qualified voters in the certified list of voters referred to in that section, which provides that such list shall, upon a scrutiny such as that in question, be final and conclusive as to such qualification to vote. There can be no doubt, nor is there any dispute, as to that; but it is contended that, under subsection 2 of that section, such persons as these voters are taken out of its provisions. The sub-section is in these words: "2. Persons who, subsequently to the list being certified, are not or have not been resident either within the municipality to which the list relates, or within the electoral district for which the election is held, and who by reason thereof are, under the provisions of "The Ontario Election Act," disentitled to vote: and under the section itself such persons are excepted out of its provisions.

But, how is it possible to bring these voters, at a municipal poll, within its provisions? As plain as any words in the English language can make it, this exception applies only to voters at a provincial election; those who by reason of such non-residence under the provisions of the Ontario Election Act are disentitled to vote.

It is said that non-residence in a municipality does not disentitle under the provisions of The Ontario Elections Act, that it is enough under it that the residence be within the electoral division; but what has that to do with the question? To say that, because this provision cannot be made wholly applicable to that which alone the Legislature has said it shall apply, any Judge may apply it to something

else to which he may think it ought to have been made applicable, but obviously has not, is surely legislation not adjudication. We ought not to forget that we are not now legislators, nor even here acting as statute revisers.

Can anyone, in reason, say that the sub-section is not limited to those who are disentitled under The Ontario Election Act; and can anyone in reason say that any of these persons are so disentitled? Surely not.

Nor is the sub-section inapplicable to those to whom it is so limited. It plainly excepts all those who are disentitled under the provisions of the Ontario Election Act; and it is quite immaterial whether the disjunctive words "within the municipality" are or are not superfluous or otherwise useless.

It may, or may not be, that the Legislature intended to make the sub-section applicable to municipal election and other municipal polls; but that is quite immaterial here because it is unquestionably certain that, whatever was intended, that was not done.

The provisions of sec. 86 of "The Consolidated Municipal Act of 1903" regarding a tenant's residence, are not repugnant in any way, to those of sec. 24 of the Voters' List Act; if they were they would be equally repugnant in respect of other wants of qualifications, such, for instance, as to the voter being a British subject; the two enactments must be read together, and so read sec. 24 makes the voters' lists conclusive evidence, upon a scrutiny, of qualification in all these respects. The qualifications are all necessary, but the inquiry under the Voters' List Act is a conclusive consideration of the question of their existence or absence.

The cases upon this subject have, I think, all been rightly decided; it is for the Legislature, not the Courts, to cure the want of expression, including municipal electors in sub-sec. 2, if it sees fit.

For a like reason I am obliged to express my opinion upon the last question dealt with in the Divisional Court, a question which I should hardly have thought arguable; to give effect to the order of Middleton, J., if it would be to refuse to be guided by the plain words of legislative enactment, and to fly in the face of the whole trend of legislation regarding the secrecy of the ballot, without any sort of authority for it.

I find it impossible to understand how it can truly be said that a person who has voted, and whose vote has been counted, is not a person who has voted, merely because he may not have been a qualified voter. Effect ought to be given to the plain meaning of plain language.

The numbered ballot was in force for years in provincial elections, not for the purpose of ascertaining how good votes were cast, but for finding out how votes proved to have been invalid were cast, so that they might be deducted from the proper side; but even that was considered such a menace to the secrecy of the ballot that it was wiped out of the statute law entirely.

But if there were not these things against the order made in this respect, in the first instance, the cure would seem to me to be worse than the disease; one who, having no vote voted, and probably swore "his vote in," would not be unlikely, when obliged to say how he voted, tell an untruth about it; and so the double wrong would most likely be done; the bad vote would remain on the side for which it was cast, and a good one be taken from the opposite side. It would be absolutely impossible to trace the ballot, and highly impossible that anyone but the voter would be able to give any testimony as to the way in which he actually voted.

Besides all this, shewing how one man, or several men, voted may in some cases shew others voted, and absolute secrecy seems to be needful to give the required feeling of absolute security; and nothing should be done to throw doubt upon the absolute secrecy of the ballot where voting by ballot is in force. To compel anyone to disclose his vote, or rather to answer upon oath any question as to how he voted, would in another way lead to the disclosure sometimes of the votes of qualified voters, for Judges are not infallible, qualified voters may erroneously be held to be unqualified; and doubt would, in any case, be thrown upon that essential of the ballot system, a feeling of absolute security is absolute secrecy. I would dismiss the appeal.

HON. MR. JUSTICE MACLAREN also dissented.

HON. MR. JUSTICE MAGEE:—Upon the scrutiny under sec. 369 of the Consolidated Municipal Act, 1903, the County Judge has found 142 ballots marked in favour of the by-law and 92 against it, and he rejected six ballots as improperly or insufficiently marked. But he has gone beyond mere in-

spection of the ballot papers and on inquiry has found that five persons deposited ballots whose names were on the voters' list as tenants but who had for more than a month before the polling been and then were non-residents of the municipality, and four of them in fact were non-resident at the time of the certification of the list and continuously thereafter. He considered the five not entitled to vote and having no evidence as to how they marked their ballot papers he could not certify that the 142 votes nor more than 137 were cast for the by-law. The Divisional Court has prohibited him from certifying that the by-law was not carried and this appeal is from that order. Four questions arise: First, has the County Judge the right upon the scrutiny under section 369 to go beyond an inquiry how the ballot papers actually received and deposited were marked (involving if necessary an inquiry as to lost and spurious ballots) and to inquire into the right of persons to vote whose names are upon the voters' list and who have received and deposited their ballot papers; Second, if so can he reject the votes of persons entered on the voters' list as tenants who were not in fact residents of the municipality at the time of the final revision of the voters' list and who have continued to be non-resident until after the polling day and who in fact had not any other right as tenants; Third, can a person who at the time of polling had no right to vote but whose name was on the voters' list and who received and deposited a ballot paper be required to state how or whether he marked it; and fourth, what is the result if it be found that some of those who voted had no legal right to vote and there is no evidence as to how they voted.

The appellant, D. H. Mehring, who petitioned for the scrutiny, contends for an affirmative answer to the first and second questions and for the negative to the third, and on the fourth that the number of illegal votes must be deemed to be possible supporters of the by-law. The respondent, Dugald Sutherland, a supporter of the by-law, who applied for the prohibition order appealed from, contends for the opposite. The anomalous spectacle is presented of friends of the by-law trying to uphold votes which they believe to have been cast against it, while the opponents wish to have these votes rejected without inquiry on which side they were.

The first question was decided in the affirmative in 1908, by a Divisional Court in *Re Saltfleet By-law*, 16 O. L. R.,

and despite the objections which have been made thereto I cannot say that I have any doubt as to the conclusion there arrived at—as then pointed out, the history of the legislation, the reasons for it, the procedure adopted, the language copied from other enactments, the manifestly designed analogy between the proceedings for by-laws and municipal and provincial elections, and the absence of any other provision for contesting the result where the clerk declares a by-law to have been defeated, all point to the intention in 1876 to use the word “scrutiny” in the sense in which it is ordinarily and in other enactments used, and clearly to distinguish it from a mere recount on examination of the ballot papers themselves. The provision for this scrutiny was made in 1876, and has remained unchanged, and it should be interpreted as then. It was then called “scrutiny of the ballot papers,” as it is still; and in 1880, in 43 Vict. ch. 27, sec. 16, it was manifestly this scrutiny which was referred to as “scrutiny of the votes” as it yet is the corresponding present section 366, and in section 366a on a similar subject. Indeed, only in sections 366, 366a, and 369, do I find the word “scrutiny” used, though a scrutiny is manifestly intended and necessary in other proceedings. As pointed out in the *Saltfleet Case*, votes and ballot papers were evidently considered interchangeable expressions. The scrutiny then, in my opinion, involves the inquiry as to the right to vote, and is not a mere recount which with the right to take evidence necessary there for a recount, section 189 (7 Edw., ch. 40, sec. 40), is elsewhere provided for. But in the inquiry as to right to vote, regard must be had to the enactment as to finality of voters’ list.

That brings us to the second question as to whether the non-resident tenants could properly vote. In *Ellis v. Renfrew*, O. L. R., it was pointed out that the provision in the Voters’ List Act, 1907, 7 Edw. VII. ch. 4, sec. 24, as to the list when finally revised being final and conclusive evidence upon a scrutiny, was intended only for provincial and municipal elections and not for voting on by-laws—and that the list itself was not the one to be used for the latter purpose, but being the list of all and only those entitled to vote at elections, the clerk had to make from it the list to be used for the by-law. In no other sense is it made final for by-law purposes. But the effect for the present case is practically the same. That section 24 in clause 2 expressly excepts from

the finality of the list "persons who subsequently to the list being certified are not or have not been resident either within the municipality to which the list relates or within the electoral district for which the election is held, and who, by reason thereof, are under the provisions of the Ontario Election Act, disentitled to vote. In the *Orangerille By-law Case*, 20 O. L. R. 476, the learned Chief Justice of the Common Pleas considered that these last words referring to the latter Act controlled the whole of clause 2 and that, therefore, it does not refer to Municipal Elections. But with much deference I think he has not given due weight to the fact that the Election Act does not require residence after the list in the municipality but only in the electoral district (8 Edw. VII. ch. 3, secs. 19 & 95, and Forms 17, 18, 19), whereas the Municipal Act (in sections 86 & 112), does require residence in the municipality, and the reference in clause 2 to the latter would be meaningless if the clause is inapplicable to municipal elections. I am, therefore, of opinion that clause 2 as far as the word "relates" must in this case be applied.

Even assuming that to be so, the Divisional Court considered that the votes of the four tenants referred to could not be struck off as they had not changed their status, and the list was conclusive that they were resident tenants. It has not been contended that the fifth should not be struck off if the list is not final. The result would be that he who was longer a resident would be in a worse position than those who had severed their connection with the municipality long before and who in fact were wrongfully on the list while he was rightfully on it. I find nothing in the statute to force us to such a conclusion. The words are plainly "Persons who subsequently to the list being certified are not or have not been resident." It does not say persons who subsequently have become not resident or persons who have subsequently ceased to be resident, but persons who subsequently are not resident. I confess with much deference to the opinions expressed, I cannot see any warrant for adopting any other than the ordinary interpretation or striving for a result so opposed to the policy of the Act against non-residents having a voice in the municipality's affairs. Reference has been made in some of the cases to the judgment of the learned Chancellor in the *Saltfleet Case* as if he had expressed an opinion that a continued non-resi-

dence would not disqualify, but I do not read it as saying more than that subsequently occurring non-residence would disqualify, which is evidently all that he meant to deal with. In my opinion, the learned County Judge rightly held all these five votes to be invalid.

It is not suggested that there is any means of proving on which side they or any of them were cast, unless by calling the voters themselves to disclose it. If any one or more of them had intentionally displayed his ballot after marking it, though he might be punished for doing so, I do not see why any one who saw it and who was not sworn to secrecy should not be admitted to prove if he could how it was marked.

In the absence of evidence of that sort we come to the third question. Section 200 of the Consolidated Municipal Act, 1903, declares that no person who has voted at an election shall in any legal proceeding to question the election return, be required to state for whom he has voted. Section 351 makes that section apply also to voting on by-laws. The provision in section 200 goes back to 1874 (38 Vict. ch. 28, sec. 34). Like provision was made in 1874 as to provincial elections by 37 Vict. ch. 5, sec. 32 (now 8 Edw. VII. ch. 3, sec. 166), and as to Dominion elections, by 37 Vict. ch. 9, sec. 77. Section 200 should be construed in the same way as those enactments. Up till 1906, the Provincial Election Law was such that if upon a scrutiny it was found that a person not entitled to vote had deposited a ballot paper it could be traced and inspected by the Court and rejected. There was and is no lawful way of doing so in municipal or Dominion elections, nor since 1906, in provincial elections. Thus it was the declared policy of the Legislature that in case of necessity upon a scrutiny there should be no secrecy for an invalid vote. Yet, side by side with that policy there was this broad provision that "no person" who voted should be required to state how he voted." It is not even limited by saying 'no voter.' To some extent it might be said that the very provision for unearthing the ballot would indicate that the voter could not be asked what it would shew. In rendering the ballot now untraceable legally in provincial elections a scrutiny has not been done away with. (See section 24 already referred to). And the necessity for evidence of some other sort as to the marking of the ballot is greater, but the wording of the section protecting the voter remains the same

and must still have the same interpretation. Indeed the change has emphasized the policy of secrecy. But the fact that when the Provincial Act, 37 V. c. 5, s. 32, was enacted entitling the voter to keep silent the law made other provisions for obtaining the evidence, is, I think, a reason for giving the Ontario law even a more liberal and not a less liberal interpretation in favour of the voter than the Dominion law which had the same wording.

The Ontario municipal provision (now section 200) should have the same interpretation as that in the Ontario Elections Act. Until the case of the *Orangeville By-law*, 20 O. L. R. , the precise question here does not seem to have arisen. There have been several cases in which lawful voters were not allowed to be asked or to state on oath how they had marked the ballots. In the *Lincoln Election Case*, 4 A. R. 206, it is pointed out that the protection of the statute is around the voter until his vote is proved invalid—but it was not absolutely decided that if invalid the protection would be removed. I fully agree with the view of Mr. Justice Britton in the present case, that as a vote may have been given in perfect good faith, although it turns out that the right to it did not exist, it is important that unless the law clearly provides otherwise, the person honestly casting it should have the benefit of secrecy. The opinions given upon the Dominion Act, although referring to rated votes, are wide enough in their terms to include those turning out to be invalid and if voters willing to tell how they voted are excluded from doing so by the policy of the law, much more should those who as probably in this case would be unwilling to do so. I am of opinion that they cannot be asked. There is much, however, to be said in favour of the contrary view. In the United States the result of decisions is thus stated in 15 Cyc. 424, under "Elections": "And it would seem that the same considerations of public policy which relieve the voter himself from being compelled to testify for whom he voted should prevent other proof of that fact. But this protection is extended to legal voters only. When it has been established that a voter was not a legal elector any person having requisite knowledge may testify as to the person for whom he voted and he may be compelled himself to disclose for whom he voted unless he claims the other and different privilege of refusing to criminate himself." "According to the weight of authority the exemption from obligation to

disclose the character of his vote can be claimed only by the voter himself. But on the other hand it has been held that in an election contest voters cannot testify at all as to how they voted. Where it does not appear from direct testimony for what candidate an unqualified voter voted, the fact may be shewn by circumstantial evidence."

The fourth question is one which might arise upon any Dominion, provincial or municipal election as well as upon any by-law. It is not certain and cannot be made certain how any of the five illegal votes were cast. They may have been in favour of the by-law. If so, it would only have 137 supporters and, therefore, not the requisite three-fifths. If any one of the five voted against it then it would certainly have 138 against a possible 91, which would be sufficient. On the affidavits there is every probability that at least two who were well known opponents voted against it, but probability is not enough. The question turns upon the issue involved. In the *Lincoln Case* the Court said: "The solution of this question seems to follow from a consideration of the issue raised. The respondent had been returned as duly elected. The petitioner in claiming the seat for Mr. Neelon (the unsuccessful candidate), undertakes to prove that he received the majority of legal votes. That proposition he is bound to establish affirmatively. Where it is sought to diminish the majority of the respondent" (Mr. Rykert who had been returned as elected) "by a vote, two things must be proved: firstly, that the voter had no vote; and, secondly, that he assumed to vote for the respondent. In the case put, the second is incapable of proof, and the petitioner, therefore, fails to prove that the vote was cast for Rykert and not for Neelon." Similarly in the United States, the result of the authorities is thus stated in 15 Cyc. 416: "In a statutory contest at the suit of a defeated candidate, the certificate of the Board of canvassers is prima facie evidence of the result, and the contestant, whatever may be his ground of complaint, has the burden of establishing it. Where the validity of the returns is not attacked on the ground of fraud, it is not enough to shew that illegal votes were cast, it must be shewn that a sufficient number of such votes were cast for the successful candidate to change the result."

If the scrutiny could be looked upon as an appeal from the clerks' certificate that the by-law was carried and as

an affirmative assertion that more than two-fifths voted against it, then this case would be governed by the principle of the decision in the *Lincoln Case*, and the onus would be upon the opponents of the by-law to shew that the clerk's return was wrong, and failing affirmative proof of it by shewing that all five persons voted for the by-law, the clerk's return of 141 against 92 would stand, except as amended by the Judge by the addition of the one improperly rejected ballot.

But the scrutiny cannot, I think, be so looked upon. The question is not the same as the question between two candidates where each asserts that he has been elected and not merely that the other has not been elected. The scrutiny may be asked for by any elector and he need not even have voted. He has only to shew to the Judge reasonable grounds for a scrutiny and does not need to assert that a different result should be arrived at. He simply asks a more certain result. It might be that mistakes in one polling subdivision would be offset by those in another, the ultimate result being the same. He might be a supporter of the by-law who believed that a greater majority should be declared. In such a case he should not be deemed to be asserting that the bad votes were cast against the by-law, and because he failed in proving it meet the result that they should be assumed not to have been against it. The petitioner for a scrutiny does not, I think, raise any issue other than the original one—whether or not three-fifths of the legal voters have decided for the by-law—although he does render himself liable to costs.

Such a petitioner is not in the same position as one making an application to quash a by-law. It might well be that the onus would be upon the latter to shew that the by-law was defeated and if he failed in affirmative proof the by-law would stand. Whatever the result would be upon such an application to quash, upon a scrutiny under section 369, the whole question is open and the Judge is not to enquire merely as to the allegations made in the petition to justify the scrutiny, but having been satisfied that there was reasonable ground for one he is, under section 371, to determine not the truth of those allegations nor the truth of the clerk's return, but "whether the majority of the votes given is for or against the by-law"—that is the necessary majority of legal votes—and he is to certify the result to the Council.

The Judge can only arrive at the result upon the evidence before him, which is here that five persons voted who should not have done so, and they may or may not all have voted for the by-law, and, therefore, he cannot say that it has been carried.

In my opinion, therefore, the prohibition should not have been granted, and the appeal should be allowed without costs.

I regret to have to come to this conclusion in this case, because there is every reason to believe that the by-law was lawfully carried, but it rests with the Legislature to say whether it will permit evidence as to the way in which illegal voters marked their ballots. The result of the present condition of the law is that a man who has no vote may first have his vote added to those opposing a by-law and then deducted from the number of those supporting it and thus count twice as much as that of the lawful voter.

HON. MR. JUSTICE TEETZEL.

APRIL 6TH, 1912.

REYNOLDS v. FOSTER.

3 O. W. N. 983.

Vendor and Purchaser — Contract for Sale of Land — Specific Performance — Action for — Statute of Frauds — Description of Land — Extrinsic Evidence as to Identity — Failure to Prove Charge of Fraud.

An action for specific performance of a contract for sale of the King George Apartments, on Bloor street, Toronto, for \$60,000, and in the alternative for damages for breach of contract. The defences chiefly relied upon were: 1. Fraud and misrepresentation by the plaintiff and his agents as to the income derived from the property. 2. No sufficient tender of conveyance by plaintiff, and (3) the whole agreement was not in writing, as required by the Statute of Frauds.

TEETZEL, J., *held*, that no fraud was practised by either plaintiff or his agents, but that the contract was incomplete, as it did not contain express provision for payment of principal money of a mortgage to be given, and incapable of enforcement. Action dismissed, but as defendant failed to support his charge of fraud, no costs were allowed.

An action for specific performance of a contract for sale of the King George Apartments on Bloor street, Toronto, for \$60,000, and in the alternative, damages for breach of contract. It was admitted at the trial that since the action the plaintiff has resold the property for \$53,000, and he claims as damages the difference in price and certain expenses, also a large sum for special damages.

The defences chiefly relied upon were: (1) Fraud and misrepresentation by the plaintiff and his agents as to the

income derived from the property; (2) No sufficient tender of conveyance by plaintiff; and, (3) The whole agreement was not in writing as required by the Statute of Frauds.

C. A. Moss, for the plaintiff.

Hon. Wallace Nesbitt, K.C., and E. E. Wallace, for the defendant.

HON. MR. JUSTICE TEETZEL:—I have no difficulty in finding as a fact upon the evidence that there was no fraud, deception or misrepresentation practised by either the plaintiff or his agents as to the income derived from the property or any other matter inducing the contract, and that if the defendant misunderstood the statements as to income or other matters it was due to his own stupidity or want of care.

I also find that before the time fixed for completion of the contract the plaintiff was ready and willing and in a position to carry out all its terms which were imposed upon him, of all which the defendant had knowledge. I also find that before the time fixed for completion the defendant repudiated the contract, and did not intend to perform any of its terms, and that what the plaintiff did in the way of formally tendering his conveyance was all that under the circumstances was necessary for him to do to entitle him to maintain this action assuming the contract meets the requirements of the Statute of Frauds.

Counsel for defendant relied upon two items in respect of which he argued that the contract is incomplete and therefore does not comply with the Statute: (1) The description of the property; and, (2) The provision that defendant, as part of the consideration, was to "give a third mortgage on King George Apartments for \$4,000 at 6 per cent."

The property is described as follows: "All and singular the premises situate on the north side of Bloor street west known as 'King George Apartments' known as Nos. 568 and 570 Bloor Street west, Plan No. , as registered in the Registry Office for the said City of Toronto, having a frontage of about fifty feet by a depth of about 130 to lane 20 feet more or less." Now the fact is that at the rear of the premises the lane referred to only extends 26 feet and then turns north, and that the remaining 24 feet instead of having a depth of about 130 feet has a depth of 149 feet 5 inches, but over the rear section of 19 feet 5 inches by 24 feet the

owners to the east have a right of way from the lane to Bathurst street at the east.

Before the purchase the defendant inspected the premises and his attention was called to this section and to the right of way over it, and while he claims that he was told by plaintiff that the right of way was limited to the right of the owners to the east to take garbage over it I find as a fact that he is mistaken as to this and that he was informed that the right of way was general to those owners. Under these circumstances I am of opinion that the error in the agreement in stating the property as only having a "depth of about 130 feet to a lane 20 feet more or less" is not fatal to the agreement, and I think the general description coupled with the knowledge of the defendant that the section 19 feet 5 inches by 24 feet subject to the right of way formed part of the premises he was buying coupled also with the discussion and inspection of it bring the case within the principle of such cases as *Foster v. Anderson* (1908), 16 O. L. R. 565; *Plant v. Bourne*, [1897] 2 Ch. 281; and *Lewis v. Hughes* (1906), 13 B. C. 228; and that therefore extrinsic evidence would be admissible for the purpose of identifying the land and shewing the subject matter of the negotiations between the parties.

As to the other objection, the question is whether the omission to state the terms of the mortgage to be given back by the defendant other than the amount of the mortgage and rate of interest renders the agreement incomplete without recourse to oral testimony.

I am not able to find upon the evidence that the terms of payment of this mortgage were even orally agreed upon, for although when examined in chief the plaintiff says it was agreed to be a five years' mortgage, he recedes from this on cross-examination, and the defendant swears that there never was any such agreement. If it had been orally agreed upon and not put in the writing the judgment in *Green v. Sterenson* (1905), 9 O. L. R. 671, would probably bar the plaintiff from enforcing the agreement. It is possible that when the plaintiff's agents prepared the agreement for signature by the defendant they thought no difficulty would arise in fixing the terms of the mortgage and that it would be safe to leave the matter as a subject of future treaty, or they may have assumed that in the absence of other stipulation the principal would be payable in five years. Giving

the mortgage as part of the consideration was such a material part of the agreement, that I think it is necessary, in order to satisfy the Statute of Frauds, that the agreement should contain such particulars as would enable the Court in the event of specific performance being asked, to declare the terms of the mortgage which the defendant should execute. While the Court will carry into effect a contract framed in general terms where the law will supply the details, it is also well settled that if any details are to be supplied in modes which cannot be adopted by the Court, there is then no concluded contract capable of being enforced. Fry, (5th ed.), par. 368.

See *South Wales Railway Co. v. Wythes* (1854), 5 De G. M. & G. 880; *Bayley v. Fitzmaurice* (1857), 8 E. & B. 664.

No difficulty would of course arise as to general form and terms of the mortgage to be given, as I think, in the absence of any provision to the contrary, the law would imply a mortgage in terms of the "Short Forms of Mortgages Act." See Fry, (5th ed.), pars. 372-379, and cases cited.

I can find no authority indicating that in the absence of express provision the law will imply the terms upon which the principal money of a mortgage, agreed to be given, shall be payable. In paragraph 369 of Fry, (5th ed.), a number of instances upon authorities cited in the notes are given where it has been held that the contract was incomplete, such as when it was not stated from what time an increased rent was to commence; where the contract did not state either directly or by reference the length of the term to be granted; where a contract for a lease for lives neither named the lives nor decided by whom they were to be received; where there was a contract for a partnership which defined the term of years but was silent as to the amount of capital, and the manner in which it was to be provided.

I think that the matter of when and how the principal money was to be payable was such a material part of the agreement that its omission rendered the agreement incomplete, and that it is impossible by implication to supply the omission, and that therefore neither judgment for specific performance nor for alternative damages can be awarded.

The action must be dismissed, but the defendant having failed to support his charge of fraud there will be no costs.

HON. MR. JUSTICE MIDDLETON.

MARCH 23RD, 1912.

RE MATTHEW GUY CARRIAGE AND AUTOMOBILE
CO.

3 O. W. N. 270.

*Company—Winding up — Contributory — Bonus Shares—Illegally
Issued at Discount — Cancellation of — Shareholder Attending
Meetings—Estoppel.*

MIDDLETON, J., *held*, that a shareholder's attendance at meetings of a company is sufficient to estop him from denying that he is a shareholder, but not to estop him from denying that he is a holder of more shares than those covered by certificate issued to him on which he voted.

That where a company illegally issued shares at a discount, it is competent for the directors to cancel the allotment and the certificates of shares so issued.

An appeal by the liquidator from a certificate of the Master-in-Ordinary, dismissing an application of the liquidator to place the name of R. W. Thomas upon the list of contributories.

G. H. Kilmer, K.C., for the liquidator.

W. S. McBrayne, for the contributory.

HON. MR. JUSTICE MIDDLETON:—Those in charge of this company seem to have formed the erroneous impression that they could issue stock at less than par; and some time before the first of March, 1911, Mr. Thomas signed two applications for stock. By the first he subscribed for 125 shares, of the par value of \$100, and agreed to pay for the same \$10,000 on or about March 1st, 1911. This stock he intended to carry in his name. At the same time he subscribed for forty other shares, for which he agreed to pay \$3,200 on or about the 1st March; these shares to be made out in the name of F. R. Daniels. There does not appear to have been any stock allotted or any notice of allotment. The affairs of the company appear to have been conducted in the laxest manner possible, and, so far as the records and evidence shew, there was no corporate action whatever with respect to these subscriptions.

Early in March Thomas paid to the company \$10,000 in cash, and received from the company stock certificates in the name of Daniels for forty fully paid-up shares, and in his

own name certificates for eighty-five fully paid-up shares, which together would represent the stock he would be entitled to receive, including the bonus stock.

On the 30th March he gave his note to the company for \$3,200. This note was not at that time treated as a payment of the balance remaining upon his subscription, but was treated as an accommodation to the company. The note matured on the 3rd July, was paid, and was then treated as being a payment of the balance due for stock. By this time some question had been raised as to the legality of the issue of this bonus stock, and Thomas had taken the position that he would not receive the bonus stock; and he requested a certificate to be made out to him, not for the forty shares which he would be entitled to receive upon the bonus basis, but for seven shares only, which, with the 125 already issued, would be paid for in full by the \$13,200 that he had paid to the company.

On the 3rd August a resolution was passed reciting that whereas applications for stock had been taken upon the understanding that a portion of the shares to be issued should be given as a bonus, and certificates had been issued for this bonus stock, and whereas the directors and shareholders had been advised that this issue of bonus stock was illegal and it had been mutually agreed to cancel the applications and recall any certificates, by which it was resolved that all applications for stock which included bonus stock, and all certificates issued for bonus stock, should be recalled and that new applications should be received for the stock, without the bonus, and that new certificates should be issued.

It is not clear whether this resolution was passed at any meeting duly called, but apparently all the shareholders assented.

The original applications signed by Thomas were returned to him with a memorandum written across the face "cancelled by resolution of the Board, July 17," signed by the secretary-treasurer. There is no record in the minute book of any such resolution; but the applications were returned to Mr. Thomas with this memorandum, and for them were substituted, at some time after the resolution of August 3rd, applications for forty shares and ninety-two shares, antedated as of January 27th, which was probably about the real date of the original subscriptions—these bearing no date upon their face.

Thomas attended meetings of the company as a shareholder, and undoubtedly would be estopped from denying that he was a shareholder; but I can see no reason why he should by virtue of this estoppel be held to be a shareholder in respect of any greater number of shares than were covered by the certificates issued to him.

It is true that the first 125 shares were issued as fully paid-up, when 25 of them were really bonus shares; but when the note was paid in July Thomas and the company mutually agreed that \$2,500 then paid should be applied in discharge of the liability in respect of the bonus shares then issued, and that \$700 should be applied in payment of seven other shares covered by the certificate of the 3rd July.

I can find nothing which will preclude Thomas from denying any allotment or notice of allotment with respect to the shares over and above the 132.

Moreover, I think the transaction which took place in July and August, by which the subscriptions were returned because the parties were advised that what was contemplated was illegal, and new subscriptions substituted, was *intra vires* of the company and is binding upon the liquidator.

While, therefore, I cannot accept the reasons given by the learned Master, I arrive at the same conclusion, and hold that the liquidator is not entitled to place Thomas upon the list of contributories with respect to the thirty-three shares of stock in question.

I dismiss the appeal, but I do not give costs, because the laxity with which the affairs of this company have been conducted has invited the litigation, and I do not think the creditors should suffer thereby.

I do not know that the question of the liquidator's costs is before me, but I may say that I think the appeal was justified and that he may properly be allowed his costs out of the estate.

HON. MR. JUSTICE MIDDLETON. APRIL 29TH, 1912.

WALLACE v. EMPLOYERS' LIABILITY ASSURANCE CORPORATION.

3 O. W. N.

Costs—Scale—County or High Court Scale—Action on Accident Insurance Policy—Con. Rule 1132.

In an action on an accident insurance policy

MEREDITH, C.J.C.P., *held*, 20 O. W. R. 385, that plaintiff was entitled to double indemnity and gave him judgment for \$1,300 with costs.

COURT OF APPEAL, 21 O. W. R. 249, reduced the damages awarded to \$650, holding plaintiff entitled to single indemnity only. No costs of appeal

Plaintiff then obtained from the trial Judge an endorsement on the record that costs were to be taxed on the High Court Scale, which was allowed by the Taxing Officer. Defendants appealed to

MIDDLETON, J. *Held*, that the judgment as varied by the Court of Appeal was one not within the jurisdiction of a County Court, the action being not merely for a money recovery, but also for a declaration as to right for weekly indemnity, which declaration was part of the judgment. Appeal dismissed with costs.

Quære, as to right of trial Judge to amend record after judgment entered, and as to power to make an anticipatory order as to costs.

An appeal by the defendants from the certificate of the senior Taxing Officer at Toronto, refusing to tax to the defendants a bill of the excess of their costs over and above the County Court costs under Consolidated Rule 1132.

Irving S. Fairty, for defendants.

D. Urquhart, for the plaintiff.

HON. MR. JUSTICE MIDDLETON:—The action was brought to recover weekly payments due upon an accident insurance policy. The defendants disputed all liability, but in addition to the question of liability there was a question of whether the plaintiff should recover single or double liability.

The action came on for trial before the Hon. the Chief Justice of the Common Pleas, who gave judgment in favour of the plaintiff, but reserved the question as to the scale of liability. Some discussion then took place, in which the Chief Justice stated that if he came to the conclusion that the plaintiff was only entitled to single liability he would award costs upon the High Court scale, as although the amount recovered would be within the jurisdiction of the

Thomas attended meetings of the company as a shareholder, and undoubtedly would be estopped from denying that he was a shareholder; but I can see no reason why he should by virtue of this estoppel be held to be a shareholder in respect of any greater number of shares than were covered by the certificates issued to him.

It is true that the first 125 shares were issued as fully paid-up, when 25 of them were really bonus shares; but when the note was paid in July Thomas and the company mutually agreed that \$2,500 then paid should be applied in discharge of the liability in respect of the bonus shares then issued, and that \$700 should be applied in payment of seven other shares covered by the certificate of the 3rd July.

I can find nothing which will preclude Thomas from denying any allotment or notice of allotment with respect to the shares over and above the 132.

Moreover, I think the transaction which took place in July and August, by which the subscriptions were returned because the parties were advised that what was contemplated was illegal, and new subscriptions substituted, was *intra vires* of the company and is binding upon the liquidator.

While, therefore, I cannot accept the reasons given by the learned Master, I arrive at the same conclusion, and hold that the liquidator is not entitled to place Thomas upon the list of contributories with respect to the thirty-three shares of stock in question.

I dismiss the appeal, but I do not give costs, because the laxity with which the affairs of this company have been conducted has invited the litigation, and I do not think the creditors should suffer thereby.

I do not know that the question of the liquidator's costs is before me, but I may say that I think the appeal was justified and that he may properly be allowed his costs out of the estate.

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Quære, as to right of trial Judge to amend record after judgment entered, and as to power to make an anticipatory order as to costs.

An appeal by the defendants from the certificate of the senior Taxing Officer at Toronto, refusing to tax to the defendants a bill of the excess of their costs over and above the County Court costs under Consolidated Rule 1132.

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D. Urquhart, for the plaintiff.

HON. MR. JUSTICE MIDDLETON:—The action was brought to recover weekly payments due upon an accident insurance policy. The defendants disputed all liability, but in addition to the question of liability there was a question of whether the plaintiff should recover single or double liability.

The action came on for trial before the Hon. the Chief Justice of the Common Pleas, who gave judgment in favour of the plaintiff, but reserved the question as to the scale of liability. Some discussion then took place, in which the Chief Justice stated that if he came to the conclusion that the plaintiff was only entitled to single liability he would award costs upon the High Court scale, as although the amount recovered would be within the jurisdiction of the

County Court, the action in truth determined a larger question, as the plaintiff had not recovered from his injuries at the time the action was brought, and would be entitled to receive weekly instalments falling due after the issue of the writ.

After consideration, the Chief Justice came to the conclusion that the plaintiff was entitled to recover upon the double liability scale, and therefore gave judgment for the plaintiff for \$1,300 with costs. Recovery being for an amount clearly beyond the jurisdiction of the County Court, no order was made or could then properly be made under Rule 1132.

An appeal was had from this judgment to the Court of Appeal, and that Court, on the 6th March, 1912, varied the judgment by reducing the amount of the recovery to the scale of single liability, thus cutting down the amount of money recovered from \$1,300 to \$650. No costs were given of the appeal, and no order was sought or made under Rule 1132 to prevent a set-off.

Some time thereafter the learned Chief Justice added to the endorsement upon the record these words:

"If it is ultimately held that the plaintiff is entitled only to the single indemnity, the costs will, nevertheless, be taxed on the High Court scale."

The defendants brought in before the Taxing Officer a bill for taxation, and claim that the plaintiff is only entitled to tax County Court costs, and that the defendants are entitled to the set-off provided by the Rule in question.

The Taxing Officer has overruled this objection, considering that he is bound to give effect to the amended endorsement upon the record; and from this ruling the present appeal is had.

The defendant places its contention before me upon two somewhat different grounds. First, it is said that the learned trial Judge had no jurisdiction to alter his judgment; that the judgment had been settled and issued; it was in conformity with the judgment actually pronounced; and upon the principles indicated in *Port Elgin v. Eby*, 17 P. R. 58, and *McIlhargey v. Queen*, 18 O. W. R. 763, the trial Judge was *functus officio*; and that for the same reason the Court of Appeal, if applied to, would be unable to afford any relief.

In the second place, it is said that while Rule 1132 enables a trial Judge to deal with the question of costs when

he gives judgment for an amount within the jurisdiction of an inferior Court, it does not enable him to make an anticipatory order dealing with the question of costs in a case where he gives a judgment for an amount beyond the jurisdiction of the inferior Court, but which may be reduced by an Appellate Court. It is said that the Appellate Court and the Appellate Court alone has power to "order to the contrary" when it so reduces the amount as to place the plaintiff in jeopardy.

Both these contentions appear to me to be exceedingly formidable; but upon the best consideration I can give to the matter I do not think it is necessary to determine either of them in this case; because the judgment as varied by the Court of Appeal is not in my view one within the proper competence of a County Court. The action was not merely for a money recovery, it was also for a declaration; and, as modified by the Court of Appeal, it contains first, a declaration "that the injuries which the plaintiff received on the occasion mentioned in the statement of claim, resulted in temporary total disability, but were not received while he was a passenger within the meaning of the policy sued on;" and then follows a recovery for \$650, "26 weeks' benefit accrued at the time of the issue of the writ herein." This is followed by an award of costs, which will carry costs upon the High Court scale unless it can be said that the action is within the competence of the County Court.

It may well be that the effect of an action to recover the accrued instalments would be to determine all the matters in issue so as to bind the parties litigant in any action for instalments which subsequently accrue; but the judgment here does not leave the rights with respect to the subsequent instalments to be determined upon any principle of *res judicata*, but makes them the subject matter of a substantive adjudication; so that it cannot be said that this action was concerned merely with the past-due instalments; it is in form as well as in substance an action dealing with the instalments yet to accrue. The learned trial Judge thought—and apparently the Court of Appeal agreed with him—that this made the case one in which the plaintiff was entitled to have his full costs even though he failed in recovering the full amount sued for; as the defendant, instead of admitting liability to the extent of the single indemnity, denied liability altogether.

For this reason the appeal should be dismissed, and I can see no ground for withholding costs.

DIVISIONAL COURT.

APRIL 6TH, 1912.

BEATTY v. BAILEY.

3 O. W. N. 990; O. L. R.

Land Titles Act—Charge or Mortgage—Covenant for Payment—Implied by s. 34 of Act—Action to Recover on—Statute of Limitations.

Action by a holder of a second charge under the Land Titles Act to recover \$797.20 upon the statutory covenant implied by s. 34 of the Act.

Defendant pleaded (1) Statute of Limitations and (2) that plaintiff had lost his rights by releasing the land to facilitate its sale by the first chargee thus putting it out of his power to reconvey on payment.

DIVISIONAL COURT *held* that the obligation to pay rested upon the covenant or contract imposed by the statute, and was therefore an action founded upon a specialty and not barred within 20 years.

That as the land charged was not of sufficient value to satisfy even the first chargee, the release given by the second chargee was given under compulsion to save expense, and that his inability to reconvey could not be invoked when it arose from the chargor's own default.

Palmer v. Hendrie, 28 Beav. 341, distinguished.

Judgment entered for plaintiff for amount claimed with costs. Judgment of York County Court, 10th February, 1912. reversed.

An appeal by the plaintiff from a judgment of HIS HONOUR JUDGE DENTON, of York County Court, dismissing his action to recover \$797.20 for principal and interest, upon a covenant implied in an instrument creating a mortgage or charge upon land registered under the Land Titles Act.

The appeal to Divisional Court was heard by HON. SIR JOHN BOYD, C., HON. MR. JUSTICE LATCHFORD and HON. MR. JUSTICE MIDDLETON.

W. J. Elliott, for the plaintiff, appellant.

W. C. Chisholm, K C., for the defendant, respondent.

HON. SIR JOHN BOYD, C.:—The Land Titles Act was expressly designed to simplify titles and to facilitate the transfer of land; it is not intended to change or destroy civil rights and remedies. True it is that "seals" were in effect abolished as a necessary part of any instrument affecting land, and the forms given in the Act or approved by the Act for the transfer and the mortgaging or charging of land are to be without seals. This is intended to emphasize the fact

that the virtue of the Act does not rest on the technical form and execution of the conveyance, but upon the fact of the instrument (whatever it is) being registered under the Act. It is the certificate of this registration held by the owner which corresponds to the ordinary possession of title deeds: R. S. O. 1897 ch. 138, sec. 101.

Section 13 provides that the first registration of any person as owner of land with an absolute title shall vest in that person an estate in fee simple. Section 33 provides for the mortgaging of registered land thus: every owner may charge the land with the payment of an appointed sum which charge shall be completed by entering on the register the person in whose favour the charge is made as owner of the charge. Section 34 provides that where such a registered charge is created on land there shall be implied on the part of the owner of the land, his heirs, executors, etc., a covenant with the owner of the charge to pay the principal sum charged. And, by sub-sec. 2, where any charge, whether under seal or not, is expressed to be made in pursuance of the Act respecting short forms of mortgages or refers thereto, then the form of words therein (according to the clauses numbered) shall have the same meaning and effect as are provided for in the Act as to short forms.

By sec. 40 (3) on the certificate of the owner of the charge authorizing the discharge of any part of the land therefrom or any part of the money secured thereby, the Master may note, the discharge of such land from the charge or the discharge of such money.

By sec. 41 every transfer of land under the Act is completed by entering on the register the transferee as owner, and till such entry the transferor shall be deemed to remain owner of the land.

Section 101 provides for the creation of a lien on the land, that is, in equity such as would arise out of a deposit of the title deeds.

Section 107 is thus expressed: "Notwithstanding the provisions of any statute or any rule of law, any charge or transfer of land registered under this Act may be duly made under a charge or transfer without seal." By amendment made after and not affecting this transaction this section is remodelled by declaring that the charge or transfer may be duly made by an instrument not under seal, and if so made the instrument and every agreement, stipulation, and condition

therein shall have the same effect for all purposes as if it were made under seal.

By the rules annexed to the Act, No. 71 directs the use of the forms given in the schedule, and No. 28 gives the form (not under seal) used in this case by the owner, Bailey, when he mortgaged to Beatty, in August, 1891. That mortgage was to be paid in June, 1894, and in the case of an ordinary mortgage under seal the Statute of Limitations would be at the end of 20 years—the mortgage being made before 1st July, 1894 (R. S. O. ch. 72, sec. 1, sub-sec. h.). In the form given by the Land Titles Act and in the instrument which was registered in this case there is nothing as to the covenant to pay; that term is supplied by the statute in sec. 34, already quoted, i.e., such a covenant shall be implied as against the owner of the land who creates the charge which is completed by the fact of registration. So that the obligation to pay as by and under a covenant to pay is to be regarded as a statutory obligation placed upon the owner for the benefit of the lender or chargee.

The additions to sec. 107 made by the amendment now appearing in 1 Geo. V. ch. 28, sec. 102, may prove useful in litigation arising upon the instrument in other jurisdictions, but do not seem to be needed in the present case.

The registered charge which is created *uno flatu* with the covenant to pay included or implied by virtue of the statute, is to be regarded as the effective and completed instrument, binding both land and person so far as security for the money advanced is concerned, and though the land may be discharged by an act of grace on the part of the charges that does not per se relieve the covenantor from the payment of the debt till after 20 years have elapsed without action to recover the claim.

The release given by Beatty was limited to the land in question, and he expressly reserves his rights in respect of the moneys secured and to be paid. The effect is to free the land for the benefit of the first chargee and so enable him to realize more speedily by sale of the estate, which was not worth what was due on the first charge. The effect of the registration of this cessation was upon sale to give the purchaser an absolute ownership as to the land, but to leave unimpaired the rights of the plaintiff to proceed for the recovery of the amount due by the mortgagor, Bailey: *Re Richardson*, L. R.

12 Eq. 398; *Bell v. Ross*, 26 Vict. L. R. 512, per Madden, C.J.

The obligation to pay rests upon the covenant or contract imposed by statute and is therefore an action founded upon a specialty within the meaning of the Statute of Limitations, and is not barred by lapse of time less than 20 years from the date of default (which at the earliest was in this case 1894): *Cork and Banden R. Co. v. Goode*, 13 C. B. 826; *Essery v. Grand Trunk R. Co.* 21 O. R. 224, following *Ross v. Grand Trunk R. Co.*, 10 O. R. 447.

No defence, therefore, arises by virtue of any Statute of Limitations or lapse of time.

The judgment below, therefore, should be entered against the defendant on this issue.

The next defence and the one to which effect was given by the County Judge rests upon the equitable situation of the parties, which I proceed to consider.

The first mortgagee had a power of sale by the terms of the mortgage and the statutory charge, and could enforce a sale against the mortgagor. It may be that the concurrence of the then owner of the equity of redemption and the second mortgagee assisted in the more inexpensive way of realizing upon the property; but it is undoubted that the land was disposed of by the paramount act of the first mortgagee; and the law is that if a surplus remains unpaid after the exercise of a power of sale the mortgagee may sue for its recovery by action on the covenant: *Rudge v. Richens*, L. R. 8 C. P. 358. The release of the land by the second chargee was only to facilitate either the foreclosure or the sale of the property by the first mortgagee—as it appeared then that the land was not of value to satisfy even the first mortgagee. Had the land been foreclosed by the first mortgagee, that change of the property would not have interfered with the right of the second mortgagee (who was not to blame) to sue upon the covenant. No doubt the rule is, the mortgagee suing on a covenant in the mortgage must ordinarily be in a position to reconvey the land upon payment of what is due. But that does not necessarily apply to the case of a second mortgagee, whose rights against the land have been extinguished by the act of the first mortgagee. The law is summarized in Coote thus, that the inability of the mortgagee to reconvey will not bar the right of action on the covenant if such default arises from any default of the mortgagor; 7th ed., vol. 2, p. 982.

The mortgagor's duty was here to pay off the first mortgage and so prevent the exercise of the power of sale by which the equity of redemption was extinguished. I think the principles of decision acted on in *Re Burrell, Burrell v. Smith*, L. R. 7 Eq. 466, apply to this case, and go to invalidate the judgment pronounced by the learned County Judge. I think judgment should be entered for the amount claimed with costs and costs of appeal.

HON. MR. JUSTICE LATCHFORD:—I agree.

HON. MR. JUSTICE MIDDLETON:—I entirely agree with my Lord the Chancellor, and only desire to add a few words out of respect to the learned Judge whose decision we are reversing.

The right of the mortgagor, when sued upon a covenant, to demand a reconveyance of the mortgaged property, discussed in *Kinnaird v. Trollope*, 39 C. D. 636, and the cases there cited, and the equitable right to restrain such action when the mortgagee has put it out of his power to convey, cannot, it seems to me, be invoked where the inability to reconvey arises from the default of the mortgagor himself. Here the non-payment of the first mortgage made the estate of the mortgagee absolute at law, and made the right of the plaintiff, as second mortgagee, liable to foreclosure in equity.

I do not think that the consent given by the plaintiff to the immediate exercise by the first mortgagee of his right to sell the lands operates to release the covenant. He has at most waived the taking of formal legal proceedings by the first mortgagee, which would not be to the advantage of any one; and, moreover, in his waiver he has expressly reserved his rights against the mortgagor.

It is clear to me, at least, that the loss of the property was occasioned, not by the action of the plaintiff, but by the rights conferred upon the first mortgagee by his security and by the default of the defendant himself. This brings the case within the principle enunciated in *Re Burrell, Burrell v. Smith*, L. R. 7 Eq. 399.

In *Palmer v. Hendrie*, 28 Beav. 341, the plaintiff failed to recover because he assented to the purchase money being paid to the owner of the equity of redemption instead of insisting upon it being applied in discharge of the mortgage debt. It was this and not the concurrence in the sale that was deemed improper.

HON. MR. JUSTICE MIDDLETON.

APRIL 9TH, 1912.

D. v. W.

3 O. W. N. 993.

Evidence—Attempt to Discover Opponent's Evidence—By Examination of Witness for Particulars—Irrelevancy—Abuse of Process.

MIDDLETON, J., *held*, that a party cannot by seeking to examine a witness on a motion for particulars of a pleading upon matters not relevant to the motion, endeavor to ascertain the evidence upon which his opponent would rely at the trial and that such an attempt was a flagrant abuse of the process of the Court.

Motion by the plaintiff for an order directing Bertha Alice D. to answer certain questions asked her upon her examination as a witness on a pending motion and in default committing her to the common gaol for contempt.

W. T. J. Lee, for the plaintiff.

G. M. Clark, for the defendant.

C. A. Moss, for Bertha Alice D.

HON. MR. JUSTICE MIDDLETON:—An action is brought by D. E. D. for \$50,000 damages said to have been sustained by reason of the defendant having procured the said Bertha Alice D., the plaintiff's wife, to desert him and to live in adulterous intercourse with the defendant.

The defendant, in addition to denying the charges made against him, says that if the said Bertha Alice D. did at any time cohabit with him the defendant and absent herself from the home of the plaintiff, this was done with the consent and connivance of the plaintiff, and for the purpose of carrying out a conspiracy between the plaintiff and his said wife for the purpose of placing the defendant in a false and compromising position, so as to enable the plaintiff to obtain money from him.

The plaintiff has served notice of motion returnable before the Master in Chambers for particulars of the acts upon which the defendant relies in support of the allegations that the plaintiff connived at the relation between the defendant and his wife, and for particulars of the conspiracy between the plaintiff and his wife, and the times when and places where and the acts upon which the defendant relies in proving such conspiracy.

In support of this motion the plaintiff has filed no affidavit of his own, but seeks help from the examination of his wife as a witness.

The wife, on being served with a subpoena, attended with counsel, and protested against the examination sought; and after being sworn answered some preliminary questions, but as soon as it became apparent that the examining counsel intended to enquire into her relations with the defendant, she, on the advice of her counsel, declined to answer, whereupon the plaintiff launched this motion.

With the pleading and its sufficiency or the fate of the motion for particulars I am in no way concerned. It is, however, quite clear to me that the examination sought is a flagrant abuse of the process of the Court. The sufficiency of the pleading and the plaintiff's right to particulars must depend in the first place upon the pleading itself; possibly it may be important that he should pledge his own oath as to his ignorance of the matters upon which he seeks information; but I am clear that he has no right by the mere launching of this motion to call upon his wife to undergo, at his instance, an examination touching the matters which will be in issue at the trial of the action. The desire of the plaintiff, it is quite clear, is to use the process of the Court for an indirect and ulterior purpose. The evidence sought is not relevant to the issue upon the motion; in fact the plaintiff's counsel went so far as to say that he was seeking in this way to ascertain the evidence upon which the defendant would rely when he came to prove his case at the trial.

Obviously this is not the function of particulars; and if it were, the party seeking particulars would not be allowed to anticipate a favourable result of his motion by obtaining in this indirect way the information he seeks by it.

Other reasons were suggested upon the argument as justifying this examination at this stage. These reasons were even more improper than that specifically dealt with.

The motion must be dismissed; and I fix the costs of the wife, to be paid forthwith, at thirty dollars; this to cover any claim she may have for allowance to her counsel for attending upon the examination. The costs of the defendant will be to him in any event of the cause.

HON. MR. JUSTICE RIDDELL.

APRIL 10TH, 1912.

LEAKIM v. LEAKIM.

3 O. W. N. 994.

*Marriage—Action by Husband for Declaration of Nullity—Grounds
Impotency of Wife—Jurisdiction of High Court—Con. Rules
261, 617.*

RIDDELL, J., *held*, that the High Court has no power to declare a marriage a nullity on the ground of impotency.

T. v. D., 15 O. L. R. 224, followed.

Motion by the defendant to strike out the statement of claim and to dismiss the action, heard in Weekly Court.

T. J. W. O'Connor, for the defendant's motion.

L. F. Heyd, K.C., for the plaintiff, contra.

HON. MR. JUSTICE RIDDELL:—The plaintiff alleges in his statement of claim that he and the defendant were married in Russia, that the defendant was born without vagina uterus and tubes and consequently physically incapable of copulation; and the marriage was never consummated although the parties lived together for some time. He asks for a declaration that "the alleged ceremony of marriage did not constitute a valid marriage between the said parties or in the alternative that the said marriage may be dissolved." A motion is made under C. R. 261 to strike out the statement of claim and to dismiss the action.

It is clear that the case is fully and exactly covered by *T. v. D.*, 15 O. L. R. 224, by which I am bound.

Without, therefore, expressing an independent opinion, I follow *T. v. D.* and strike out the statement of claim. The writ of summons is endorsed for the same relief as is asked in the statement of claim and there is no pretence that the statement of claim can be amended. It is therefore a proper case for turning the motion into a motion for judgment under C. R. 617 and to dismiss the action.

The motion will be allowed, the statement of claim struck out and the action dismissed with costs.

DIVISIONAL COURT.

APRIL 10TH, 1912.

McCLEMONT v. KILGOUR.

3 O. W. N. 999.

Negligence — Dangerous Machinery — Servant Caught and Whirled Around Shaft—Head of Set Screw Projected about one Inch.

DIVISIONAL COURT affirmed judgment of Britton, J., 20 O. W. R. 770, 3 O. W. N. 446, Digest Can. Case Law, March, 1912, col. 475. *Baddeley v. Earl Granville*, 19 Q. B. D. 423, followed. Review of authorities.

An appeal by the defendants from a judgment of HON. MR. JUSTICE BRITTON (1912), O. W. R. 3, O. W. N. 446, upon the answers of the jury.

The appeal to Divisional Court was heard by HON. SIR WM. MEREDITH, C.J.C.P., HON. MR. JUSTICE TEETZEL and HON. MR. JUSTICE KELLY.

T. N. Phelan, for the defendant, appellant.

W. M. McClemont, for the plaintiff.

HON. MR. JUSTICE TEETZEL:—The action was for damages under the Workmen's Compensation Act, the negligence relied upon being a breach of the Ontario Factories Act in not guarding dangerous machinery. The questions and answers were:—

(1) Were the defendants guilty of any negligence which occasioned the accident to the plaintiff in not having the projecting set-screw in the collar upon the shaft in defendants' factory guarded otherwise than it was guarded when the plaintiff was injured? Answer: Yes.

(2) If so, in what respect was the defendant so guilty? What was the negligence of which defendants were guilty? Answer: In not having a separate guard over set-screw or in not having a collar on shaft with countersunk set-screw.

(3) Did the plaintiff know and appreciate the danger of the work at which he was employed at the time the accident happened and did he knowing the danger voluntarily undertake the risk? Answer: Yes.

(4) Could the plaintiff by the exercise of reasonable care have avoided the accident? Answer: No.

Damages assessed at \$1,000.

The grounds of appeal chiefly relied on by Mr. Phelan were (1) That there was no evidence of negligence to warrant the case being submitted to the jury, and if there was any negligence it was that of the plaintiff, who failed in his duty as foreman, within the meaning of sec. 6 of the Workmen's Compensation Act: (2) That the evidence established contributory negligence and that the finding of the jury on that question was perverse; (3) That the maxim *volenti non fit injuria* applied and the answer to the third question therefore entitled defendant to judgment dismissing the action.

The set-screw by which the plaintiff's clothing was caught and which caused his injury, projected at least an inch and a quarter above the surface of the collar which it entered. The collar with the projecting set-screw surrounds a shaft which when in operation revolves very rapidly, and having regard to its position and use was, unless well guarded, manifestly when in operation a source of danger to defendants' employees who might be required to work near it.

The plaintiff's case is founded upon the claim that the defendant violated the provisions of the Ontario Factories Act in not, as far as practicable securely guarding the set-screw in question. The defendant had provided a box-shaped guard or covering for the whole shaft, the top of which was removable, and the principal contest at the trial centred around the question whether under all the conditions that guard was sufficient and that led to the first question being put to the jury, referring to the guard which had been provided by the defendant.

Before the accident the plaintiff removed the top of the guard in question, to enable him to place upon the belt a mixture used to prevent the belt slipping around the pulley. For that purpose the plaintiff stepped inside the box-shaped guard, and while putting on the mixture his leg was necessarily near the collar in question and the projecting screw caught his trouser leg and he was thrown down upon the revolving pulley, and his knee cap was shattered and other injuries inflicted.

The plaintiff swore that in order to properly do the work he undertook, it was necessary for him to get inside the box although he knew the unguarded condition of the screw.

It was also manifest from the size of the box that while standing in it and putting the mixture on the belt one of his legs would not be far from the revolving collar and screw.

There was evidence that the set-screw could have been securely guarded, or sunk into the collar, so that no part would have been projecting beyond the surface of the collar; and the jury in answer to the second question so found, a conclusion which I think is warranted by the evidence. The effect of this finding, coupled with the admittedly dangerous character of the machinery, is to find the defendant guilty of a violation of sub-sec. 1 of sec. 20 of the Factories Act.

Evidence was given by the defendant that the plaintiff could have applied the mixture to the belt without getting in the box; and the jury were given a view of the machine in operation, and of tests made to apply the mixture without the operator getting in the box.

As observed by the learned trial Judge there certainly was very strong evidence of contributory negligence, but I agree with him that it was not so conclusive and undisputed as to warrant that question being withdrawn from the jury; nor, the jury having been permitted to view the machine and the tests made to demonstrate the plaintiff's alleged negligence, can I say that the finding was perverse.

Having thus a finding in effect that the defendant was guilty of a violation of the Factories Act, and a finding absolving the plaintiff from contributory negligence, the effect of the jury's answer to the third question remains to be considered.

The question of the applicability of the maxim *volenti non fit injuria* in relief of a defendant guilty of a violation of a statutory duty such as is imposed by the Factories Act, was settled by a Divisional Court in England in *Baddeley v. Earl Granville* (1887), 19 Q. B. D. 423, where the decision was that the defence arising from the maxim was not applicable in cases where the injury arise from the breach of a statutory duty on the part of the employer. Mr. Phelan cleverly criticized this decision as being at variance with the decision of the Court of Appeal in *Thomas v. Quartermain* (1887), 18 Q. B. D. 685, and as not reconcilable with recognized legal principles, and his argument was supported by the view of Mr. Beven in an article on the maxim published in 13 Law Magazine 19, in 1888, also in his Law of

Negligence, 3rd ed. (Canadian) 644, also by Mr. Labatt, at p. 1512-14 of his book on Master and Servant.

It is to be observed, however, that the decision has never been overruled and is treated by the following writers as settling the law that the defence of *volenti non fit injuria* is not available where the injury arises from breach of a statutory duty on the part of the employer for the benefit of the workmen himself and others: Underhill on Torts (9th ed.), 1912, p. 190, Clerke & Lindsell's Law of Torts (Canadian edition, 1908), pp. 518 and 522, h; Ruegg's Employers' Liability (8th ed., 1910, pp. 235-6; Smith's Law of Master and Servant (6th ed., 1906) 209; Dawbarn on Employers' Liability (4th ed.) 1911, p. 73; and Pollock's Law of Torts (7th ed., 1904), 505.

The decision has also been followed by the Courts of this country. Citing it, in *Rogers v. The Hamilton Cotton Company*, 23 O. R. 425, at p. 435, Mr. Justice Street in delivering a judgment in the Divisional Court, says, "The principle *volenti non fit injuria* has been held not to apply when the accident has been caused by the defendant's breach of a statutory duty. And even if applicable the knowledge of the workman of the existence of the defect has been considered to be merely an element in the question of contributory negligence. *Thomas v. Quartermain*, 18 Q. B. D. 685."

It has also been applied in British Columbia by the Supreme Court in *Love v. New Fairview* (1904), 19 B. C. 330; and by the Supreme Court of Nova Scotia in *Bell v. Inverness* (1908), 42 N. S. 265.

The holding in *Groves v. Wimborne* (1898), 2 Q. B. 402, and adopted in many subsequent cases, that the defence of common employment is not applicable in a case where injury has been caused to a servant by the breach of an absolute duty imposed by statute upon his master for his protection shews the strong judicial tendency to construe and apply such provisions so as to effectually secure the intended protection. See *Sault Ste Marie Pulp Company v. Meyers* (1902), 33 S. C. R. 23, and *Siven v. Temiskaming* (1912), 21 O. W. R. 454. Lord Shaw of Dunfermline, in *Butler v. Fife Coal Co.*, [1912] A. C. 149, at pp. 178-9, said: "The commanding principle in the construction of a statute passed to remedy the evils and to protect against the dangers which confront or threaten persons or classes of His Majesty's subjects is that, consistently with the actual language employed, the

Act shall be interpreted in the sense favourable to making the remedy effective and the protection secure. This principle is sound and undeniable."

This is a most interesting case and illustrates the view of the highest Court in the Empire as to the strictness with which employers of labour should be held to the observance of duties cast upon them by statute for the protection of their employees.

The judgment should be dismissing the appeal with costs.

HON SIR WM. MEREDITH, C.J.C.P.:—I agree.

HON. MR. JUSTICE KELLY:—I also agree.

DIVISIONAL COURT.

APRIL 10TH, 1912.

RUDD v. CAMERON.

3 O. W. N. 1003; O. L. R.

Defamation—Slander—Brought about by Action of Plaintiff—Privilege—Malice—Quantum of Damages.

Plaintiff, a contractor, having heard that slanderous statements were abroad concerning him, employed two detectives to trace their origin. They approached the defendant, a physician, and told him they were desirous of building a club-house in the vicinity and that plaintiff wished to secure the contract for building it. Defendant thereupon uttered slanderous statements concerning plaintiff.

BRITTON, J., at trial entered judgment for plaintiff for \$1,000 upon the finding of the jury in favour of plaintiff. The false statements having been spoken in reference to plaintiff's business and calling.

Defendant appealed on the ground chiefly that the speaking of the words complained of having been brought about by the action of the plaintiff himself there was no publication in law.

DIVISIONAL COURT dismissed the appeal with costs following *Duke of Brunswick v. Harmer*, 14 Q. B. 185.

Review of authorities.

An appeal by the defendant from a judgment of HON. MR. JUSTICE BRITTON, dated 15th November, 1911, directed to be entered on the verdict of the jury after the trial in an action for slander, heard at Pembroke on that and the previous day.

The appeal to Divisional Court was heard by HON. SIR WM. MEREDITH, C.J.C.P., HON. MR. JUSTICE TEETZEL and HON. MR. JUSTICE KELLY.

W. M. Douglas, K.C., for the defendant, appellant.

E. F. B. Johnston, K.C., for the plaintiff, respondent.

HON. SIR WM. MEREDITH, C.J.C.P.:—This action is for defamatory words alleged to have been spoken of the respondent in the way of his trade.

The appeal is rested upon two grounds: (1) that there was no evidence of publication, and (2) that the occasion upon which the words were spoken was privileged, and there was no evidence of malice; and it was also contended that the damages awarded (\$1,000) are excessive.

According to the testimony of the respondent, having learned that statements affecting him similar to those alleged to have been made by the appellant, and which form the basis of the action, were in circulation, and being unable to trace them to their source he employed two detectives "for the purpose of ascertaining the facts and getting information for his solicitors," p. 47, which I understand to mean for the purpose of finding out the author of the statements and bringing an action against him.

The detectives having made the acquaintance of the appellant adopted the ruse of telling him that they were going to erect a club house in the vicinity of Arnprior, and that the respondent was anxious to secure the contract for building it. Their object, no doubt, was to induce the appellant to speak his mind as to the respondent, and in this they appear to have succeeded, for it is upon what was then said by the appellant that the action is based.

The occasion upon which the words were thus spoken was privileged, but it is contended by the learned counsel for the appellant that the speaking of them having been brought about by the action of the respondent himself there was no publication, and in support of that contention, he cited *King v. Waring* (1803), 5 Esp. 13; *Smith v. Wood* (1813), 3 Camp. 323, 14 R. R. 752; and Starkie on Slander (3rd ed.) pp. 381 and 514.

King v. Waring was an action for a libel contained in a letter written by the female defendant, and Lord Alvanley, C.J., having stated that it had been decided that giving a character to a servant, however injurious to him, yet if fairly given, would not sustain an action, went on to say "but if the letter was procured by another letter not written

with a fair view of injuring a character, but to procure an answer upon which to found an action for a libel, such evidence, I think, ought not to be admitted," but as the learned Judge held that his was not proved, his statement is but an *obiter dictum*.

In *Smith v. Wood*, the action was for a libel upon the plaintiff in the shape of a caricature print entitled "The inside of a parish workhouse with all abuses reformed." A witness having stated that having heard that the defendant had a copy of this print, he went to his house and requested liberty to see it, and the defendant thereupon produced it, and pointed out the figure of the plaintiff, and the other persons it ridiculed, and this Lord Ellenborough ruled was not sufficient evidence of publication to support the action, and the plaintiff was non-suited.

It does not appear from this statement of the facts that the plaintiff had sent the witness to request liberty to see the caricature. Mr. Odgers, however, in his work on Libel and Slander (5th ed., 179), states as the facts of the case that the plaintiff hearing that defendant had in his possession a copy of a libellous caricature of the plaintiff sent an agent who asked to see the picture, and the defendant shewed it to him.

In stating that the person to whom the caricature was shewn was sent to request that it should be shewn, Mr. Odgers is, I think, in error, and in this view I am supported by the report of the case and by what appeared in the earlier editions of Mr. Starkie's treatise, where attention is called to the fact that "there was no evidence to shew that the plaintiff was in privity with the witness" (2nd ed., vol. 2, p. 87, note i. in the same edition, vol. 1, p. 456, the facts of the case are stated as they appear in the report in 3 Camp.) See also 3rd ed., p. 381, and note i. on p. 514, 4th ed. (Folkard), p. 374, note 5, p. 524, note (n), 5th ed. (Folkard), p. 409, note f., p. 441, note k., 6th ed. (Folkard), p. 409, note f., and p. 441.

In the last edition of Folkard (7th ed.), *Smith v. Wood* is referred to on pp. 166 and 263. In this edition the matter has been rearranged, and the reference on p. 166 appears in ch. 11, which deals with communications in discharge of duty, and the statement in the text is that "where the publication of the defamatory matter was procured by the contrivance of the plaintiff with a view to the foundation of an

action against the defendant the communication may be privileged on the ground that the plaintiff himself was the voluntary author of the mischief complained of," and *Smith v. Wood*, *Weatherston v. Hawkins* (1786), 1 T. R. 110, and *Warr v. Jelly* (1834), 6 C. & P. 497, are referred to as the authority for the statement.

The dictum of Lord Alvanley, C.J., in *King v. Waring*, and what was said by him in *Rogers v. Clifton* (1803), 3 B. & P. 587, at p. 592, are also referred to for the statement that "Where a plaintiff knowing the character which his master will give, procures it to be given for the sake of founding an action upon it he will not be allowed to recover."

The reference on p. 263 is merely a statement of the facts of *Smith v. Wood*, and of the ruling of Lord Ellenborough, C.J., as reported in 3 Camp.

It would appear, therefore, that the first ground of appeal has no judicial decision, except the dictum of Lord Alvanley, C.J., in *King v. Waring* to support it.

Mr. Odgers points out, p. 180, that "In many of the olders cases the Judges say 'There is no sufficient publication to support the action,' when they mean in modern parlance, that 'the publication was privileged by reason of the occasion,'" and this may have been what was meant by Lord Alvanley, C.J., as I think appears from what was said by him in *Rogers v. Clifton*, at p. 592. That was an action by a servant against his former master for an alleged libel contained in a letter written by the master to a Mr. Hand to whom the plaintiff had applied for a place, and Lord Alvanley speaking of this said, "It is material also to observe that when the plaintiff in this case applied to Mr. Hand for his place and referred him to the defendant, he did not tell him that the defendant would give him a good character; had he done so I should have suspected that he wished to lay a trap for the defendant and procure evidence to support this action; in such a case I should hold a party not at liberty to ascribe the character given by his master to malice when he had only drawn from him that which he had a right to expect."

However, this may be, in the comparatively recent case of the *Duke of Brunswick v. Harmer* (1849), 14 Q. B. 185, a different view was taken by the Court of Queen's Bench. The action was for libel published in a newspaper more than seventeen years before action; the statute of limitations was pleaded, and it was held that it was negatived by proof

that a single copy had been purchased from the defendant for the plaintiff by his agent within six years.

The libel was originally published in 1830, two copies of the newspaper were produced at the trial, one copy had been obtained from the British Museum, and the other had been purchased before the commencement of the action in 1848, at the newspaper office of the defendant by a witness who on cross-examination stated that he had been sent by the plaintiff to make the purchase and had handed the paper when purchased to the plaintiff.

It was contended by the defendant that this latter was not such a publication as would support the issue. The presiding Judge overruled the objection.

On a motion for a new trial the objection was renewed, and it was argued by counsel for the defendant that the publication proved was in law a publication to the plaintiff himself, and that it could not be the foundation of a civil action.

Coleridge, J., in delivering the judgment of the Court, after referring to the facts and the contention of the defendant's counsel, said "and in some sense it is true that it was a sale and delivery to the plaintiff; but we think it was also a publication to the agent . . . The defendant, who, on the application of a stranger, delivers to him the writing which libels a third person, publishes the libellous matter to him, though he may have been sent for the purpose of procuring the work by that third person . . . The act is complete by the delivery; and its legal character is not altered, either by the plaintiff's procurement, or by the subsequent handing over of the writing to him. Of course that this publication was by the procurement of the plaintiff is not material to the question we are now considering."

In the view of Mr. Odgers, pp. 179-180, this case, so far as the question of publication merely is concerned, overrules *King v. Waring* and *Smith v. Wood*, and Sir Frederick Pollock's note to *Smith v. Wood* (14 R. R. 752), is that Lord Ellenborough's ruling "does not seem consistent with the *Duke of Brunswick v. Harmer*."

Neither *King v. Waring* nor *Smith v. Wood*, was cited or referred to in the *Duke of Brunswick v. Harmer*; the former probably for the reason suggested by Mr. Odgers, that it related only to the question of privilege, and the latter for the same reason if the facts of it were as stated by Mr.

Odgers, or for the reason that it had no application if the facts were as stated in the report in 3 Camp.

The question has been discussed and passed upon in many cases in the United States, and among them in *Gordon v. Spencer* (1829), 2 Blackf. (Indiana), 286, 288; *Yeates v. Reed* (1838), 4 Blackf. 462, 465; *Jones v. Chapman* (1839), 5 Blackf. 88; *Haynas v. Leland* (1848), 29 Maine 233-4, 243; *Sutton v. Smith* (1853), 13 Missouri, 120, 123-4; *Nott v. Stoddard* (1865), 38 Vermont 25, 31; *Heller v. Howard* (1882), 11 Illinois App. 554; *White v. Newcombe* (1898), 25 N. Y. App. D. 397, 401; *O'Donnell v. Nee* (1898), 86 Fed. Rep. 96; *Radnead v. Delaney* (1899), 102 Tenn. 289, 294-5; and *Shinglemeyer v. Wright* (1900), 124 Mich. 230, 240. See also Cyc. vol. 25, pp. 370-1. In most of these cases the supposed ruling of Lord Ellenborough, C.J., in *Smith v. Wood*, and the opinion expressed by Lord Alvanley, C.J., in *King v. Waring* were recognized as correct statements of the law and followed.

Upon the whole we are of opinion that we should follow the *Duke of Brunswick v. Harmer*, and following it hold that there was evidence for the jury of publication, and that the first objection, therefore, fails.

The second ground of appeal also fails; there was evidence which the jury believed that there was no truth in the statements made by the defendant, and there was ample evidence, out of the appellant's own mouth on his examination for discovery, that he knew they were untrue or that he made them recklessly not caring whether they were true or false; and there was evidence from which malice might be inferred, in the bad feeling which had existed on the part of the appellant towards the respondent, and his statements to the respondent's book-keeper and stenographer, Alice Miller.

The damages are substantial, but in view of the appellant's conduct throughout and his not having gone into the box to testify on his own behalf, we cannot say that they are so excessive as to warrant the Court in setting aside the verdict.

The appeal is dismissed with costs.

HON. MR. JUSTICE TEETZEL and HON. MR. JUSTICE KELLY:—We agree.

COURT OF APPEAL.

APRIL 15TH, 1912.

RE MOUNTAIN WILL.

3 O. W. N. 1011; O. L. R.

Will — Construction — Trusts—Charitable—Creation of Bishopric—Contingency—If Happens—Valid Transfer to Another Charity—After 25 Years—Rule against Perpetuities—Effect of Will.

Testator left an estate of \$99,000, of which \$44,000 was in real estate and Hudson Bay Co. shares. This latter sum was left in trust to supply an income for a Bishop of Cornwall, or if such a Bishop was not elected within 25 years after the testator's death, the money was to go to the University of Bishop's College, at Lennoxville, for the endowment of a Professorship of Natural Science.

BOYD, C., *held*, 17 O. W. R. 448, 2 O. W. N. 246, that there was an immediate gift for charitable uses delayed as to the actual conveyance till the secured debts were paid, and, therefore, vested at the death and effective in law, though the particular application of the gift might be in suspense for 25 years, or might never take effect at all, in which contingency there was a valid transfer to another charity at the end of 25 years: That the will did not offend against the rule concerning perpetuities.

COURT OF APPEAL varied above judgment by declaring that if the executors were obliged to pay debts secured on the executor's real or personal estate otherwise than out of the income the amount so paid should be restored to the estate out of subsequent accumulated income, otherwise above judgment affirmed.

An appeal by certain of the next of kin of the testator, the late Rev. Jacob J. S. Mountain, from a judgment of HON. SIR JOHN BOYD, C., 17 O. W. R. 448, 2 O. W. N. 246.

The appeal to Court of Appeal was heard by HON. SIR CHAS. MOSS, C.J.O., HON. MR. JUSTICE GARROW, HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MEREDITH and HON. MR. JUSTICE MAGEE.

J. A. Macintosh, for the appellants.

Glyn Osler, for others next of kin, in the same interest as the appellants.

Travers Lewis, K.C., and J. W. Bain, K.C., for the Synod of the Anglican Diocese of Ottawa.

D. C. Ross, for Bishop's College, Lennoxville, Que.

R. Smith, K.C., for the executors.

HON. SIR CHARLES MOSS, C.J.O.:—This is an appeal by certain of the next of kin of the testator the Rev. Jacob Jehoshaphat Salter Mountain, D.D., from the judgment pronounced by the Chancellor of Ontario upon two of several

questions raised by the executors and executrix of the will under C. R. 938, as enacted by C. R. 1269. The questions were whether if the executors were obliged to pay debts or any part of debts secured on the testator's real or personal estate otherwise than out of income the amount so paid should be restored to the estate out of subsequently accumulated income, and whether or not the devise and bequest contained in the will to the Synod of the Diocese of Ottawa is void as offending the rule against perpetuities.

The learned Chancellor determined both these questions adversely to the contention of the appellants who are supported in the appeal by others in the same interest. Other questions were discussed by Counsel for the Synod of the Diocese of Ottawa during the argument, but if they are at all proper to be disposed of upon a proceeding of this kind they seem not to be ripe for determination at present.

The main question is, of course, whether the devises and bequests to the Synod are void under the rule against perpetuities.

The will which with three codicils deals with and purports to fully dispose of the testator's estate is a very long and intricate instrument containing many complicated and involved provisions and directions due to some extent no doubt to the testator's evident fondness for and tendency to minute detail and his desire to leave nothing unprovided for in the final disposition of his estate. And it is apparent that he must have felt satisfied that he had effectively disposed of all he possessed for there is no residuary clause.

His whole estate, real and personal, is said to be of the value of about \$99,000. There were debts which he appears to have divided into two classes, and which it was his desire should be treated differently or at least regarded in a different way by his executors in the administration of his estate (a) ordinary current debts which he calls his "just debts," and (b) debts secured by him on lands or personalty among which he seems to have included a liability of \$5,000 to the University at Windsor, N.S., for which he says he gave his "note of hand."

He desired the first class together with his funeral expenses to be paid as soon after his death as possible—his intention with regard to the other class was to postpone payment so far as to enable them to be paid off from the income of his estate. He could not, of course control the action of

the creditors in case they were not willing to wait after their claims became payable. Beyond this he gives no specific directions to his executors with regard to the payment of these debts except what is to be gathered by inference from the 19th paragraph of the will, and the direction in the first codicil as to the payment by the executors of the \$5,000 to the Alumni Association of King's College instead of directly to the University of Windsor. This latter direction is quite consistent with the payment of the amount in one sum out of the general estate instead of out of income. By the 11th paragraph of the will the testator gives directions for the conveyance of the properties there mentioned and the proceeds of any that may have been sold to the Synod of the Diocese of Ottawa to be held by it in trust for the endowment of the Bishopric of Cornwall, only delayed, if at all, by virtue of what is provided in the 19th paragraph of the will. But I do not think that these provisions were intended to affect or do affect the vesting in the Synod of Ottawa of an immediate estate or interest for the purposes designated in the 11th paragraph. The two paragraphs must be read together, and so read they are found to contain as the learned Chancellor expresses it "an immediate gift for charitable uses delayed as to the actual conveyance till the secured debts are paid, and, therefore, vested at his (the testator's) death."

Here the gift to the Synod for the charitable purposes expressed is not conditional upon the payment of the debts out of the income. The gift takes immediate effect whichever way the debts may be paid. In the recent case of *Re Bewick Ryle v. Ryle* (1911), 1 Ch. 116, much relied upon by the appellants, there was no gift to the children living, and the issue of any that might have died or any vesting in them of any beneficial interest until all the testator's real estate should be clear of all charges thereon, a wholly uncertain event, which might operate to postpone the period of vesting beyond that prescribed by the rule against perpetuities. I agree with the construction which the learned Chancellor has placed upon this will as regards this branch of the case.

As to the application of income to the exoneration of the general estate to the extent if any to which it may be called upon to answer the secured debts I am with deference unable to perceive any reason why that should not be the case. It is very apparent that while the testator was anxious if possible to free the incumbered estates by the application of

income he had no intention that they should be freed at the expense of the general estate, and I think the judgment should be varied in this respect. We were asked by counsel for the Synod, to pronounce upon a number of other points. One was with regard to a further declaration as to conditions which he submitted were in restraint of sale of the testator's Cornwall property and Hudson Bay shares. This may or may not depend upon circumstances, and could only properly arise in administration proceedings. So with regard to the alleged obligation of the testator's widow to elect between the gifts to her of a life estate in the testator's Cornwall house and one in the Isle of Wight. The facts are not sufficiently developed to enable any proper conclusion to be arrived at on this question. Then as to the claim that the Synod should be paid its costs as between solicitor and client, the rule does not extend in general beyond the applying trustee or executor and we could not interfere with the order as it now stands in this respect.

Except as indicated I would affirm the judgment appealed from the directions of which appear quite sufficient to enable all the matters dealt with by the learned Chancellor to be properly worked out.

As to costs the appellants have failed as to the substantial part of their appeal, and should pay the costs of the respondents who are adverse in interest to them. The executors' costs as between solicitor and client may be paid out of the estate.

HON. MR. JUSTICE GARROW and HON. MR. JUSTICE MACLAREN, agreed.

HON. MR. JUSTICE MEREDITH:—This matter seems to me to be within quite a narrow compass; and easy to be determined if approached in the right way.

Our duty is not to endeavour to wreck this will upon the shoals of technicality, or upon any rock of inexorable rule of law, but rather to guide it through such obstacles, and to give effect to the testator's intentions, expressed in it, if, by any lawful means, that can be done, and, for that purpose, to take a comprehensive view of the will, not to search for and stumble at, minute seeming contradictions or uncertainties; and that duty can, I think, be accomplished without any sort of serious difficulty.

I am unable to perceive any substantial reason why the gift to the Synod may not be considered a vested gift, to which the rule against perpetuities cannot be applied; and once vested the estate may last indefinitely, without offending the rule; and the gift being a gift to a charity, and the gift over to another charity, the gift over is also good, as the rule is not applied to such a case; see *In re Sykes*, [1903] 3 Ch. 325. In this respect this matter comes within the authority of *Chamberlain v. Bartlett*, 8 Ch. App. 206, and not within that of *In re Stratheden*, [1894] 3 Ch. 264, in which the gift was made upon a condition that might never happen; in this case the gift was vested, but to be divested in a certain event. The intention was not to give only in the event of the creation of the new see; that would be to frustrate, rather than to further, the testator's object, an object which was dear to his heart. He knew that that could hardly be accomplished without the means which he was providing, and possibly might not be even with them; and so the means were given presently, but to be withdrawn if the Bishopric were not an accomplished fact within the 25 years. The parenthetical restriction, contained in the 12th item of the will, may, I think, be considered an attempt to restrain alienation; whether valid or not is immaterial upon this the main question in the case.

The provision for the payment of debts out of the income does not aid the appellants in this respect, nor would if it delayed the beneficiaries, having the benefit of the gifts to them, beyond the perpetuities' period; for a trustee in such a case holds in trust for the beneficiary, subject to the payment of the debts: *Bacon v. Proctor*, T. & R. 31.

If creditors will not wait, or if the beneficiaries are willing to pay off all charges against their properties, I cannot understand why the simple method adopted in the case of *Bacon v. Proctor* should not be followed; or, in any case, why the money to pay off pressing creditors may not be raised upon the estate in such a manner as will put the new creditors in precisely the same position as the old creditors, and so leave this matter, substantially, precisely as the testator left it by his will; and, I think, this should be done. But whatever course may be adopted the burden ought to be made to fall, in all respects, just as it would under the will, if possible, and if not possible in all respects, then as nearly so as possible.

Questions of restraint on alienation do not seem to me to be proper subjects of an application such as this. An expression of opinion upon such an application would be of no useful binding effect; upon proceedings between vendor and purchaser, such a question would properly arise, and a judicial opinion be effectual. An opinion now expressed would be especially out of place, in my opinion, in regard to the land in the Isle of Wight: I, therefore, refrain from expressing any opinion upon these questions.

The question whether the widow is entitled to Pinehurst House, as well as to the bungalow, depends entirely upon the question of fact whether at the time of the testator's death Pinehurst House was his, and was also the home of his wife and himself. Each gift is for life; there is no restriction upon that of the bungalow, but in regard to Pinehurst House his will is: "She shall also have the use, rent free, during the time of her natural life, of this Pinehurst House, furnished, or of whichever house of mine may be our home at the time of my decease." So that, though the widow certainly takes the bungalow, she loses Pinehurst House, if at the time of the testator's death the bungalow were "our home," for it was unquestionably a "house of mine." In the codicil of the 29th May, 1909, the last codicil, the testator refers to his property in the Isle of Wight as his "temporary residence."

There is no sufficient ground upon which the disposition of the costs of the application can be disturbed; but the appellants ought to pay the general costs of this appeal, the substantial question being the validity of the gifts to the charities.

COURT OF APPEAL.

APRIL 15TH, 1912.

UNION BANK v. CRATE.

3 O. W. N. 1018.

Husband and Wife—Liability of Wife as Surety—Findings of Referee—Necessity for Independent Advice—Knowledge of Circumstances—Absence of Fraud and Misrepresentation—Power of Wife to Make a Valid Mortgage.

COURT OF APPEAL affirmed judgment of Divisional Court, 19 O. W. R. 299; 2 O. W. N. 1147.

An appeal by the defendants from a judgment of Divisional Court, 19 O. W. R. 299; 2 O. W. N. 1147.

The appeal to Court of Appeal was heard by HON. SIR CHAS. MOSS, C.J.O., HON. MR. JUSTICE GARROW, HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MEREDITH and HON. MR. JUSTICE LATCHFORD.

F. E. Hodgins, K.C., and C. M. Garvey, for the defendants, appellants.

J. A. Hutcheson, K.C., for the plaintiffs, respondents.

HON. MR. JUSTICE MACLAREN:—The defendants have appealed from a judgment of the Divisional Court dismissing their appeal from the report of the County Judge at Brockville on a reference to him for trial of certain actions brought by the bank against the defendants (husband and wife) based upon certain notes and a collateral mortgage, and upon an overdraft.'

Before proceeding with the appeal defendants' counsel applied to this Court for leave to adduce further evidence as to the circumstances under which the wife had executed the mortgage in question. He stated that this evidence had not been produced before the County Judge as her counsel was then relying upon the law as laid down by the Supreme Court in the case of *Stuart v. Bank of Montreal*, 41 S. C. R. 516, to the effect that the wife should have had the benefit of independent advice, and in consequence did not bring out the evidence that would have shewn that the circumstances of this case were in fact similar to those on which the judgment of the Privy Council in the *Stuart Case*, C. R., [1911] A. C. 1, was based. The evidence taken before the Referee, however, shews clearly that the facts of this case are widely different from those of the *Stuart Case*. The moneys borrowed from the bank were in large part applied to the building of a large number of houses erected for the female defendant on her private property. She herself says that she was kept pretty well informed in the office as to the indebtedness, and she discussed the course of the business with her husband. She appears to have taken a more than usually active part in looking after the business, on account of the ill-health of her husband, during a portion of the time the account was current. The application to re-open the case and adduce further evidence may, I think, be fairly described as not only unusual but extraordinary. The circumstances

are not such as were contemplated by the rules, and no precedent was cited to us of any case at all analogous to the present, and I do not think any such precedent can be found. Not even a shadow of a case has been made out for a re-opening.

It was next urged that the action on the mortgage was premature, inasmuch as some of the notes to which it was collateral were current and had not matured when the writ in the mortgage action was issued on the 12th of February, 1908. The mortgage was dated the 13th of July, 1906, and set out that the defendants were indebted to the bank in the sum of \$31,674.70 on certain notes, and \$3,778.75 of an overdraft, and that the mortgage was taken as collateral security for the payment of the said notes or of those that might be accepted in renewal of or in substitution for them. It was made payable in one year from its date with interest at the rate of seven per cent. payable every three months in advance.

I am of opinion that this objection ought not to be allowed to prevail. The defendants executed this mortgage under seal promising to pay the amount on a day named, and such payment was seven months overdue when the writ was issued. At that time at least, two of the notes amounting in the aggregate to \$11,620.75, had been dishonoured and were still unpaid. Besides this, when the action was referred to the County Judge to take the accounts between the parties, it was well understood between them that the whole accounts were to be taken. When the parties appeared before the Referee, and the counsel for the bank had stated the wide scope of the reference, the counsel for the defendants stated that he went a step further, and his understanding was that not only all matters arising in the actions, but that if anything else cropped up, any outstanding differences between the parties, it might be included in the reference so that the reference might be a final adjustment of the dealings of the defendants with the bank. This was acquiesced in, and the parties proceeded with the reference on this basis, producing all their witnesses and documents. So that, even if the objection ever had any force, it was formally waived and the defendants would now be estopped from setting it up.

As to the merits of the report, a perusal of the evidence satisfies me that the learned Referee allowed the defendants all that they were entitled to, and that the latter have failed to shew error in the report in this respect. The accounts

are very much confused by the fictitious entries made in the books of the bank by the then manager with the knowledge and connivance of the male defendant to impose upon the inspectors of the bank and to keep his superior officers in ignorance of the real condition of the defendants' account. The defendants' counsel, however, has failed to shew that they were entitled to any greater reduction than that made by the Referee, and the present appeal from the judgment of the Divisional Court which dismissed their appeal from the report of the Referee should be dismissed with costs.

HON. MR. JUSTICE GARROW:—I agree.

HON. MR. JUSTICE MEREDITH:—There is nothing substantial in this appeal. The facts of the case were carefully elicited by the local Referee, a learned Judge of a County Court, and were carefully considered by him; upon an appeal from a single Judge, to a Divisional Court—after the dismissal of an appeal from the Referee to the single Judge—the facts were again fully considered and the Referee's findings unhesitatingly affirmed; so that in so far as there has been any controversy as to such facts it can hardly be expected that can be a reversal of such findings.

But if the case were being dealt with now for the first time, upon the evidence which has been adduced in it, there would be no difficulty in coming to the same conclusions as those reached by the Referee. The appellant seeks relief as an innocent person imposed upon and seeking to save her separate property from the rapacity of wealthy creditors of her mere husband; but that position is greatly handicapped by the incontrovertible facts that that property was built up out of the moneys of these creditors, which, they are in this action, seeking to recover moneys borrowed from them for that purpose; and that the appellant was not only acquainted with business affairs sufficiently to see that the hardship would not be on her in any case, but would be upon those through whose money she has benefited so much if they should have no right to look to the fruits of it for compensation: as well as to have known a good deal about her husband's business affairs, perhaps as much as he did himself, which was not unnatural in any case and certainly not in this case in which that business seems to have consisted largely of borrowing money from the respondents and build-

ing upon and looking after the mortgaged property in question.

The Referee would not, as I find, upon the evidence adduced before him, have been justified in coming to a conclusion that the mortgage in question is invalid by reason of fraud of any character. And I cannot think that it would be proper, at this stage of the case, to permit the appellant to adduce further evidence on that branch of the case; nothing like a case for granting such an indulgence has been made out; and the incontrovertible facts are so much against such a defence that, as I think, it would be but a waste of time for the appellant to again enter upon such a forlorn hope.

It is quite too late to give effect now to the contention that the action is premature; if it were, there should not have been a reference such as was made at the trial. If in truth the reference were made against the appellant's will, she should have appealed against the order directing; but instead of doing that, the parties have fully fought the case out on the merits, and none of them should be heard now to say that all that was abortive. Besides this, it is admitted that one or two of the promissory notes was or were overdue when the writ was issued, and as admitted, that the action was not altogether premature. It was in the interests of all parties, and all parties desired, that the real question between them—whether the mortgage is or is not valid against the appellant—should be determined, and having had that considered now before four tribunals, the judgments must stand or fall upon the merits.

I would dismiss the appeal in all respects.

COURT OF APPEAL.

APRIL 15TH, 1912.

COUNTY OF WENTWORTH v. TOWNSHIP OF
FLAMBORO.

3 O. W. N. 1024; O. L. R. .

Boundary—Highway—Township Line—Deviation from Line—Substituted Road—Plan—Dedication—By-law—Road not Assumed by County—Evidence—Municipal Act (O.) (1903), ss. 617, 622-624, 641, 648.

COURT OF APPEAL, 19 O. W. R. 445, granted defendant leave to appeal from judgment of Divisional Court, 18 O. W. R. 938; 23 O. L. R. 583; 2 O. W. N. 1003, but confined the appeal to one point, namely, whether the road in question was and is a deviation road.

Held, that it was a deviation road. Judgment of Divisional Court affirmed with costs.

An appeal by the defendant from a judgment of Divisional Court, 18 O. W. R. 938; 23 O. L. R. 583; 2 O. W. N. 1003, reversing the judgment of HON. MR. JUSTICE MIDDLETON, at the trial, who dismissed the action, 17 O. W. R. 715; 2 O. W. N. 360.

The defendant applied for leave to appeal and such leave was granted, but confined to one point, namely, whether the road in question was and is a deviation road. See 19 O. W. R. 445.

The appeal to Court of Appeal was heard by HON. SIR CHAS. MOSS, C.J.O., HON. MR. JUSTICE GARROW, HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MEREDITH and HON. MR. JUSTICE MAGEE.

G. Lynch-Staunton, K.C., for the defendants, appellants.

J. L. Counsell, for the plaintiffs, respondents.

HON. MR. JUSTICE GARROW:—The defendant's objections to an affirmative answer to this question seem to be: (1) as to its origin, which it is said was the Carroll plan, and (2) that the road does not return to the line of the original boundary line road allowance.

These objections are not unlike those considered by this Court in *Fitzroy v. Carleton*, 9 O. W. R. 686. There is evidence here, slight it is true, that before the registration of the Carroll plan, the travelling public had used a road in the nature of a trespass road upon or near the line of the

road afterwards laid out upon that plan just as in the *Fitzroy Case*, a trespass road had preceded the formal action of the township councils. And in that case, as in this, the deviation did not terminate in the boundary line between the two townships where it originated, but was carried across another township boundary and thence through that township into the original line. The question there arose under sec. 617, sub-secs. (1) and (2). Here it arises under sec. 622, which does not contain the condition in sec. 617, that the deviation must only be for the purpose of obtaining a good line of road. But notwithstanding that difference, the question, what under the statute is a deviation road, must, under both sections, in my opinion, be practically the same. The statute gives no definition. Its object, no doubt, was first to assist the public in obtaining a practical highway by enabling serious obstacles in the true line to be passed around, and second, to make the general provisions as to maintenance, whereby the burden is fairly apportioned, apply. The question is really more one of fact than of law. There must have been a sufficient excuse in the nature of the ground to justify an abandonment of the original line of road. And it must appear that the deviation was intended to serve and is serving the public need which would have been served if it had been reasonably possible to open and use the original allowance; but its origin and history are of less consequence than the facts existing when the question arises, when the main enquiry must be, is the road now a public highway, and is it in fact serving the public purposes which a road upon the original allowance would have served? Its direction and its nearness to the original line are of course not to be disregarded, for a new road at right angles could scarcely be called a deviation within the meaning of the statute. But, while the general trend of the new road should be in the direction of the old, it is not, I think, imperatively necessary that the former should actually terminate in the latter. The statute does not say so, nor, in my opinion, does reason, so long as by means of some other public road the original line may conveniently be reached.

The facts here seem to be sufficient to justify the judgment of the Divisional Court. For over half a century the public in passing and repassing along the boundary line road so far as it was opened have used the new road

or deviation, to reach points which would have been reached over the original allowance if it had been opened. And that that was the intention is also, I think, established by the circumstance that the county council, before conveying the original allowance to Carroll, required a report from an engineer, which was furnished, that the new road was sufficient for public use. At that time, township boundary lines were under the jurisdiction of county councils, and if the new road was not intended to be in substitution for the old, and, therefore, a deviation within the meaning of the statute, the matter in no way concerned the county council.

I would dismiss the appeal with costs.

HON. SIR CHARLES MOSS, C.J.O., HON. MR. JUSTICE MACLAREN, and HON. MR. JUSTICE MAGEE, concurred.

HON. MR. JUSTICE MEREDITH: — The single question raised upon this appeal is whether, for the purposes of maintenance and improvement, that part of the public road in question in this action is or is not to be declared part of the town-line lying between the townships of East and West Flamboro; it is not upon the original allowance for that highway, but, for the plaintiffs it is contended that it is a deviation from it such as is mentioned in the various municipal enactments and in respect of which the duty of maintenance and improvement attaches in the same manner as if it were actually upon such an allowance for such a road.

In considering such a question, regard must be had to the purposes of the legislation involved; and such purposes seem to me to contain the controlling influence in the consideration of this case.

The purpose of the legislation was to provide convenient roads for those to whom the Crown granted lands adjacent to them, as well as for all others who might lawfully and in such a case as this the statute-imposed obligation to open, maintain and improve town-lines, including all such deviations is in very plain words put upon the adjoining townships.

So that it was the duty of the defendants, jointly with the township of East Flamboro, to open, maintain and improve the town-line in question; but, by reason of natural obstructions and difficulty in the way of such a work, that

has hitherto been quite impracticable; and the law is not unreasonable; it gives power, upon certain conditions, to open a new road in lieu of that laid down in making the original allowance for roads and to close it; and it also provides for deviations. The result of all this seems to me to leave the defendants in this predicament, if that part of the road in question has not, for the purpose of maintenance and repair, become part of the town-line, the defendants are jointly with the other township under the statute-imposed obligation, to open, maintain and improve it, an alternative which they would no doubt gladly flee from, even though in so doing they ran into that which has been imposed upon them in this action.

I can perceive no good reason why that part of the road in question may not properly be deemed part of the town-line for the purposes of maintenance and improvement; it is co-extensive only with that part of the original allowance which is impassable; if the town-line had to be opened it was necessary that there should be either as extensive a deviation, or the expenditure of money vastly exceeding the amount required in making such a deviation; and, whether that is essential or not, this deviation leads back again to the original allowance although its main purpose—a way into the city of Hamilton—is fulfilled before going as far as that. So, too, the main purpose of the original allowance for road, if opened, would be to give a way into that city.

The piece of road in question answers all the purposes of a deviation; and I am unable to perceive anything that materially stands in the way of that view of the case; unless it be that it is now not a deviation, but actually part of the line by reason of the closing of it, where naturally unpassable, and the adoption of this piece in lieu of it; an alternative which would not be helpful to the defendants.

The trial Judge seems to me to have taken quite too narrow a view of that which a deviation may be. I would dismiss the appeal.

HON. MR. JUSTICE MIDDLETON.

APRIL 11TH, 1912.

RE CONSTANTINEAU & JONES.

3 O. W. N. 1030.

Costs—Criminal Proceedings—Taxation of Costs by Local Registrar—Tariff of Costs for Civil Cases—Right of Appeal from Taxation—Refusal of Registrar to Tax Costs of Preliminary Inquiry before Magistrate—Mandatory Order—Right to Costs—Construction of Judgment Awarding Costs—Intention of Trial Judge—Criminal Code, ss. 576, 689, 1044, 1045, 1047.

MIDDLETON, J., *held*, that there is no appeal to a High Court Judge from a taxation of costs by a Local Registrar in criminal proceedings.

But where the Local Registrar failed to discharge his function at all and failed to make any allowance for costs of a preliminary enquiry before a Magistrate, ordered to be so allowed by the trial Judge.

Held, that the High Court has jurisdiction to compel the officer to exercise his function by a mandatory order, directing him to allow and tax said costs.

An appeal from a taxation of costs by the local Registrar at L'Orignal.

An information was laid before the Police Magistrate at L'Orignal for the publication of a defamatory libel, who committed the accused for trial. At the assizes the accused was surrendered by his bail, but, the prosecutor not appearing, he was discharged.

HON. MR. JUSTICE LATCHFORD made an order for the recovery by the accused (Jones) from the prosecutor (Constantineau) of his (Jones') costs occasioned by the proceedings, the same to be taxed.

The Local Registrar, upon taxation, disallowed entirely the accused's costs of the proceedings before the magistrate and largely reduced his bill in respect of the costs incurred at the assizes.

Jones appealed to HON. MR. JUSTICE MIDDLETON in Chambers.

G. A. Urquhart, for the appellant, Jones.

H. S. White, for the prosecutor, Constantineau, objected that there was no appeal from the taxation, as the proceedings were under the Criminal Code, and the provisions of the Consolidated Rules did not apply.

HON. MR. JUSTICE MIDDLETON:—An information was laid before the police magistrate at L'Orignal for the publication of a defamatory libel. The accused was committed

for trial, and, at the sittings of Assize, was surrendered by his bail; but, the prosecutor not appearing, was discharged, and an order was made by Hon. Mr. Justice Latchford directing that the accused do recover from the complainant his costs occasioned by the proceedings, the same to be taxed.

A bill was brought in before the local Registrar covering the preliminary proceedings before the police magistrate as well as the sittings at the Court of Assize and *nisi prius*.

The local Registrar, upon this taxation, has disallowed entirely the costs of the proceedings before the police magistrate and has largely reduced the costs claimed at the sitting of Assize.

The preliminary objection is taken that there is no appeal from the taxation, as the proceedings are under the Criminal Code and the provisions of the Consolidated Rules do not apply.

I think this objection is well taken. The section of the Criminal Code under which the order for payment of these costs was made, is sec. 689. It merely gives authority to direct payment of costs. Section 1047, I think, is wide enough to apply not only to costs ordered to be paid under secs. 1044 and 1045, but to apply to all costs ordered to be paid by any of the earlier provisions of the Code. This section indicates that where there is no tariff provided in respect to criminal proceedings, costs shall be taxed according to the lowest scale of fees allowed in the Court in which the proceeding is had in a civil suit. Power is given under sec. 576 to the Court to provide by general rule for the costs to be allowed; but no tariff has been promulgated under the code, and therefore the tariff applicable in civil proceedings, and provided by the Judicature Act and Rules, is applicable; but under the Code no appeal is given, nor is the right of appeal, which is found in civil cases, made to apply by the mere introduction of the civil tariff.

Upon the argument it was suggested that another remedy might be open to the applicant, in so far as the taxing officer has failed to allow anything for the costs incurred upon the preliminary enquiry.

I am quite clear that in the absence of any appellate jurisdiction, I have no right to interfere with the discretion of the officer whose duty it is to tax these costs; but it seems to me to be equally plain, that where the taxing officer has failed to discharge his function at all, and has failed to

make any allowance for the costs of the preliminary enquiry, the applicant has the right to come to this Court to compel the officer to exercise his function; and it was arranged by counsel that to save the expense of another application, this may be treated as a motion for a mandatory order, and that I should deal with the questions which would be open upon such an application.

The taxing officer has proceeded upon the theory that the trial Judge did not intend to award the costs of the preliminary enquiry, and that the language used in the judgment is not sufficient to award these costs. I have had the opportunity of consulting the learned trial Judge; and he tells me that it was his intention to make an unrestricted award of all costs over which he had any jurisdiction; and I think that the judgment adequately awards the costs of the preliminary enquiry.

The formal judgment entered recites the information before the police magistrate and the committal, and the notice of discontinuance given by the complainant and the award is "of the costs occasioned by the said proceedings."

In the second place, I think that upon the true construction of sec. 689, where costs are awarded in general terms, these include the costs of the appearance on the preliminary enquiry. The word "including" is equivalent to "which are to include." It would have been well, when the judgment was settled, to have avoided any question by following the precise words of the statute; but, when I find that the words are capable of the wider meaning, and that the learned trial Judge intended his judgment to have the wider meaning, I have no hesitation in giving to the words used a meaning which conforms to the actual intention.

The motion thus amended will be dealt with by determining that I have no appellate jurisdiction and cannot, therefore, deal with the appeal, as an appeal; but a mandatory order will go to the local officer directing him to tax and allow to the applicant his costs of the preliminary proceedings before the police magistrate. As success is divided, I make no award of costs.

HON. MR. JUSTICE RIDDELL.

APRIL 11TH, 1912.

KARCH v. KARCH.

3 O. W. N. 1032.

Husband and Wife—Interim Alimony—Application for—Quantum of Allowance—Merits of Case—Cruelty and Desertion—Resume Co-habitation.

RIDDELL, J., reduced the amount payable as interim alimony to \$6 a week and allowed the \$40 granted by the Local Master for disbursements to stand. No costs of appeal.

Held, that facts disclosed upon an examination of plaintiff on her affidavit filed cannot be used as a defence to a motion for interim alimony, the Court not being entitled to consider the merits of the case.

Keith v. Keith, 7 P. R. 41, followed.

Held, further, that when desertion but no cruelty is alleged and defendant offers by defence and affidavit to resume co-habitation, no order for interim alimony will be made.

Snider v. Snider, 11 P. R. 140, followed.

An appeal by the defendant from an order of the Local Master at Guelph allowing the plaintiff \$10 a week interim alimony and \$40 for disbursements.

W. E. S. Knowles, for the defendant.

C. A. Moss, for the plaintiff, contra.

HON. MR. JUSTICE RIDDELL:—The plaintiff in this action for alimony, alleges marriage in 1899, birth of two children still living, residence at Hespeler, refusal by the defendant since the Spring of 1911 to provide her with sufficient money for household expenses and clothing for herself and children, since that time till he left her, "a very bad temper and disposition towards" her; "on the 20th November, 1911, without any warning, the defendant left the house wherein he had up to that time resided with the plaintiff and their children, and has not returned to the said house or offered to return to it or corresponded with the plaintiff, and has in fact deserted the plaintiff." Since that day he has stopped the children on their way to school and endeavoured to excite distrust on their part toward the plaintiff; she has no means of support for herself and children; and she claims alimony, interim alimony at the rate of \$12 per week, the custody of her children, an order that the defendant maintain the children by paying such sum as may be awarded, costs, etc. The defendant admits the marriage, etc., but says that from even before 1905, the plaintiff assumed master-

ship in all things and after that time she exhibited an increasingly bad temper and disposition toward him and continuously scolded him and used bad language toward him, treated him contemptuously and encouraged the children to do the same, she kept large sums of money coming to him from his debtors and used it for other than household purposes and gave away large quantities of household supplies to members of her own family, all this against his wishes. He treated her properly and put up with her abuse for the sake of the children and to avoid public scandal till November 20th, 1911; he has provided a suitable dwelling-house and furniture for her, and made an arrangement which he has kept, to pay all accounts which she incurred for clothing, coal and wood, and in addition has paid her \$6 a week out of his wages for household expenses. For three years she neglected and refused to prepare breakfast for him and he had to get his own breakfast before going to his work—for two years she refused to co-habit with him and occupied a separate bedroom. Unable to stand her abuse and neglect and refusal to cohabit with him, he, on the 20th November, 1911, went to Dundas on a visit, remained there six weeks and then went back to Hespeler and worked for and boarded with him, the plaintiff and children residing in the house formerly occupied by them but excluding the defendant, the plaintiff making no offer of reconciliation. He has continued to pay all accounts incurred by the plaintiff for clothing and household expenses, which have been presented to him, and has given instructions to the tradesmen to call and take her orders for goods and supply them—and he denies tampering with the children. He is 55 years old, his wife 11 years younger, strong and healthy—he asks the custody of the children.

An application was made for interim alimony, the plaintiff set up that the defendant had in money and securities, etc., some \$18,500 besides a house worth \$1,700—the defendant sets out in detail his income, wages, \$2 per day, \$600; various investments, \$372.85; in all, \$972.85. The L. M. at Guelph allowed \$10 per week for interim alimony and \$40 for interim disbursements; the defendant appeals.

Both parties filed an affidavit on the application before the L. M.—and both were examined at length and without objection upon their affidavits. Were I not bound by authority I may not disregard *Cook v. Cook* (1892), 12 C. L. T.

(Occ. N.) 73, 28 C. L. J. N. S. 95, I should think these examinations so taken might be read upon the application. From the wife's examination it is plain that the ostensible reason for bringing the action is "because he left me without reason"; that she has continued living in the defendant's house with her children, using his furniture, running bills for groceries, food and clothing which he never objected to paying—the only complaint is "he is living down with his brother. Why didn't he come home and live with me and the children?" She never asked him to do so "because I thought it was his place to come back and make the first offer toward reconciliation." In June, 1911, the husband and wife made a bargain that he was to give her \$6 a week to run the house on and pay the bills for clothing and fuel—when he left she had \$43 in cash and she had still when examined \$11 left—she thinks he swore at her this summer in front of people but she did not hear the words, and judges by the tone of voice; the sole reason for bringing this action is that he went away and didn't come back—it is his duty to come back and start the reconciliation. She has not wanted for anything since he went away, the flour and feed man calls for orders and the grocer is near by. Nothing like cruelty is alleged but the husband and wife seem to have had, from time to time, the not unusual jangles about her spending too much money; and an occasional "tiff" over other matters.

Of course, no one but the wearer knows where the shoe pinches, but I can see nothing in all the allegations which would prevent two persons of ordinary common sense living together in a fairly comfortable manner. And it is an infinite pity that the defendant did not take up the implied challenge and at once make the advance toward reconciliation. He says: "Well, I thought as she wouldn't make any steps toward me, I don't need to make none toward her." But authority by which I am bound says that the examination of the wife cannot be looked at upon an application for interim alimony, as that would be going into the merits of the case.

It has been laid down from the earliest times in our Courts, that, upon an application for interim alimony proof of the marriage is all that is necessary. *Nolan v. Nolan*, 1 Ch. Ch. 368.

It was not allowed the defendant to shew that the plaintiff was living wantonly in adultery apart from her husband. *Campbell v. Campbell* (1873), 6 P. R. 128. And where the plaintiff had admitted facts which when proved at the hearing would disentitle her to the relief sought, the defendant was not permitted to make use of the examination as an answer to the application. The Referee could "see no difference in principle between considering an uncontradicted affidavit alleging adultery on the part of the plaintiff and considering this examination extracted by compulsion at the instance of the defendant for the purpose of being used as part of his defence." The decision was affirmed by Proudfoot, V.-C., and by that I am bound. *Keith v. Keith* (1876), 7 P. R. 41.

The statement of claim alleges desertion; whether the plaintiff can at the trial establish a case for alimony is immaterial, the order for interim alimony must be made unless the defendant can shew some bar such as is spoken of in *Snider v. Snider*; *Snider v. Orr, et al.* (1885), 11 P. R. 140. The decision in these cases is that if there be no cruelty pleaded, nothing but desertion, and the husband is willing and offers by defence and affidavit to resume cohabitation with his wife—she living in his house, an order for interim alimony will not go.

Nothing of the kind appears here—the only approach to it is the allegation in defence and affidavit, that he is ready and willing to properly support and maintain his children.

The order for interim alimony and disbursements must stand.

But under the circumstances, the amount ordered is rather excessive, and the interim alimony should be reduced to \$6 per week—the amount of interim disbursements may stand, as they must be accounted for at the conclusion of the action. No costs.

It is not, I trust, too late to urge upon the parties to do their best to bring about a reconciliation without regard to who should make the first advance. A stubborn persistence in their present attitude will most certainly be disastrous to themselves and to their children's future. The children they should consider before themselves, and make every endeavour to prevent calamity for them.

HON. MR. JUSTICE RIDDELL.

APRIL 11TH, 1912.

RE MILLS.

3 O. W. N. 1036.

Estates—Devolution of—Application by Administrator for Leave to File Caution nunc pro tunc—10 Edw. VII. c. 56, s. 15 (1d)—Partnership Lands—Sale by Surviving Partner—Approved by Foreign Court—Application Unnecessary.

N. M. and B. M., both of Michigan, carried on business as a co-partnership and as such owned among other assets certain lands in Lambton County, Ontario. N. M. died in 1904, and directed his executors by his will to carry on the partnership, which was done until 1905, when B. M. died. In 1908 they were directed as surviving partners by the Circuit Court of St. Clair county, Michigan, to wind up the partnership, and pursuant thereto they sold certain assets of the partnership, including the Ontario lands to themselves as executors of N. M. This sale was ratified and confirmed by an order of the Circuit Court which assumed to vest the assets sold, including the Ontario lands, in the purchasers. Later it was desired valid conveyance of the Ontario lands should be made, and letters of administration were taken out in Ontario to the estate of B. N., but the administrator neglected to file a caution within the time allotted by the statute. Motion was then made for leave to file a caution *nunc pro tunc*.

RIDDELL, J., refused motion with costs to official guardian.

Held, that purchasers had paid purchase money relying on title given by the Circuit Court and were, therefore, satisfied to accept whatever title it conferred.

That as the Circuit Court having competent jurisdiction and having all the parties before it had held that the lands in Ontario were partnership assets they partook of the nature of personal property, and the said Court could decree their sale in any manner permitted by its practice, and there was no necessity of any representative of B. M. going into the conveyance.

That "if one receive the purchase money of land sold he affirms the sale and he cannot claim against it whether it was void or only voidable."

Motion by the administrator of the estate of the late Barney Mills, for an order allowing the applicant to file a caution, under the Devolution of Estates Act, 10 Edw. VII. ch. 56, sec. 15 (1d), after the proper time for filing had expired.

J. Montgomery, for the motion.

F. W. Harcourt, K.C., Official Guardian, for certain absentees.

HON. MR. JUSTICE RIDDELL:—Nelson Mills and Barney Mills, both of the county of St. Clair, Michigan, and citizens of that State, were in partnership under the firm name of H. & B. Mills, in which Nelson Mills had a three-fourths and Barney Mills a one-fourth interest. Amongst other

firm assets the partnership owned Stag Island in the county of Lambton and State of Michigan.

Nelson Mills died in 1904, having made a will and codicil whereby he appointed M. W. M. and D. W. M. his executors and directed them to carry on the partnership. They did so until the death, in 1905, of Barney Mills; then, in 1908, they were directed by the proper Court in that behalf in Michigan, to wind up the partnership within the year ending 4th May, 1909. They sold, in 1909, certain of the real property of the firm, including Stag Island (with certain property personal and mixed) to themselves as executors for over one-quarter of a million. By a decree of the Circuit Court for the County of St. Clair (in Chancery), the sale was confirmed, and it was "ordered, adjudged and decreed, that said M. W. M. and D. W. M., executors of the estate of Nelson Mills, deceased surviving partner of the co-partnership of N. & B. Mills, make, execute and deliver to M. W. M. and D. W. M., executors and trustees of Nelson M., deceased, the necessary conveyances, deeds and other papers to convey all the property, real, personal and mixed, of the co-partnership of N. & B. Mills, and more particularly the following descriptions of property as are hereinafter more fully set forth, and that in case said executors do not make, execute and deliver the necessary conveyances to transfer and vest in M. W. M. and D. W. M., executors and trustees of the estate of Nelson Mills, deceased, all the property . . . of said co-partnership . . . that then this decree is to stand and operate as such conveyance and a certified copy thereof placed on record in the Register of Deeds offices in the various counties and States of the United States of America, and the Province of Ontario, Canada, wherein the real property is located will be a proper conveyance to pass the title of said real property to M. W. M. and D. W. M., executors and trustees of the estate of Nelson Mills, deceased, to receive said property free and clear from all claims and liabilities of N. and B. Mills, co-partnership—the description of said property being as follows . . .” Amongst the real estate described appears Stag Island.

It would appear that all the beneficiaries of the Barney Mills estate have received their share of the estate, including a share of the proceeds of this sale.

Barney Mills had died intestate in 1905, and his administrators have distributed his estate with the approval of the Michigan Court having jurisdiction in the premises.

It is desired that a valid conveyance of Stag Island be made, and W. J. Barber of Sarnia, has taken out (October, 1910), letters of administration in the Surrogate Court of Lambton; he, however, neglected to register a caution within the proper time.

A motion is made by him to be allowed to file a caution now, under 10 Edw. VII. ch. 56, sec. 15 (1), (d).

The beneficiaries are so scattered that it is impracticable to obtain their consent—the Official Guardian is not willing to give consent without some intimation by the Court that he should do so, moreover, the applicant desires that an order be made dispensing with the payment of money into Court, C. R. 972 (c). In fact, the purpose is simply that the Ontario administrator shall make a conveyance to M. W. M. and D. W. M., executors and trustees of the estate of Nelson Mills, in accordance with and to carry out in a manner which will give them a valid and registerable title of the Ontario land, the sale they made under authority of the Michigan Court.

I do not think the order should be made under the circumstances set out—it is not the ordinary case of a personal representative in good faith desiring to sell land of his estate which has gone from him under 10 Edw. VII. ch. 56, sec. 13 (1), but a wholly different case.

The purchasers were willing to pay the purchase price and did so, on the title which they had or could themselves make.

And I see no necessity for any proceedings by the Ontario administrator.

Of course, the vesting order granted by the Circuit Court is wholly invalid to affect land in Ontario, considered as land, and no doubt so far as that land is concerned, was either *per incuriam* or granted *quantum valeat*. All the formalities for passing title to real property are those prescribed by the *lex rei sitae*. Story on Conflict of Laws, secs. 435 sqq., and cases noted. So that while upon the doctrine of *Penn v. Lord Baltimore* (1750), 1 Ves. Sr. 444, and like cases, the Michigan Court had full power to direct the executors to make a conveyance of Ontario land, that Court could not make its own decree effective as a conveyance. *Norris v. Chambres* (1861), 29 Beav. 246; s.c. (1861), 3 D. F. & J. 583. *Re Hawthorne Graham v. Massey* (1883), 23 Ch. D.

743; *Companhiade v. Mocambique v. B. S. A. Co.* (1892), 2 Q. B. 358, may also be looked at on similar points.

But it appears that the land was really partnership assets. It further appears that between the deaths of Nelson and Barney Mills, they carried on the partnership business as partners of Barney Mills. They had no right to become such partners simply because they were executors of the deceased partner. *Pearce v. Chamberlain*, 2 Ves. Gr. 33; accordingly, Barney Mills must have assented to such partnership, and the decree of a Court of competent jurisdiction in an action to which the administratrices of Barney Mills the parties not only finds that such partnership did exist till the death of Barney M., but, also, that the executors of Nelson M. became, at such death, "the surviving partner entitled to wind up the said co-partnership" and ordered that they should do so. As surviving co-partners, they were entitled to sell all the partnership property, and they did so. Whether a sale by them to themselves would be permitted under our practice, we need not enquire, a Court having jurisdiction in the premises in an action to which the administratrices and all beneficiaries of Barney M. were parties, has approved the sale.

In my view, under these circumstances, there is no necessity of any representative of Barney Mills joining in the conveyance. The land was partnership assets, and the surviving partner could sell it—and there is no difference in the powers of a surviving partner in a foreign partnership and in a domestic partnership.

Co. Lit. 129 C.; Bacon Abr., Alien, D.; so long as the foreigner is not an alien enemy and the countries are at peace.

It is not, I presume, necessary to elaborate the doctrine that, according to our law, land owned as partnership assets is personal property.

All difficulty about the two M. W. M. and D. W. M. conveying to themselves, can be got over by an appropriate form of conveyance—as to which any Ontario solicitor could advise. If it be feared that at some time some of the beneficiaries of Barney M. may make some claim, the decree of the Circuit Court may be appealed to; and, moreover, "it has been ruled uniformly, that if one receive the purchase money of land sold, he affirms the sale, and he cannot claim against it whether it was void or only voidable." *Maple v.*

Kussart (1866), 53 Pa. St. 348, at p. 352. And the same rule applies where the claimant has received part of the purchase money only. *Stein v. Stein* (1907), 9 O. W. R. 65; 10 O. W. R. 720 (O.C.A.); and in the Supreme Court, *Clark v. Phinney* (1895), 25 S. C. R. 633, and cases cited by Sedgewick, J. And ignorance of the facts could not be alleged, since all parties were represented by counsel.

Upon both grounds: (1) that the purchasers were content to pay their purchase money upon the authority of the Circuit Court, and did not deal with the representatives of the Barney Mills estate; and (2) the order sought is wholly unnecessary, I refuse the motion. The O. G. will have his costs.

It may be that a declaration of ownership could be obtained in the High Court of Justice for Ontario in an action properly framed, but that is not a matter upon which I pass; on the present application, that would be impossible.

HON. MR. JUSTICE KELLY.

APRIL 11TH, 1912.

SMITH v. HOPPER.

3 O. W. N. 1039.

Executors and Administrators — Action against to Recover for Services Rendered Testatrix — No Promise to Remunerate — Monthly Payments During Life Time — Legacy — Services Covered by.

Plaintiff, a niece of the late Selina Gillbard, had, on the death of the latter's husband, in August, 1907, at the suggestion of the executors of his estate and some relatives, gone to live with her aunt to keep her company as she was of an advanced age. No agreement was made as to remuneration, but her aunt voluntarily told plaintiff that she would do well by her. The services performed by plaintiff were of a trivial character and she received from her aunt \$10 per month as pin-money. On her aunt's death in November, 1910, plaintiff received a legacy of \$2,000 and a contingent interest in another \$1,000.

KELLY, J., *held*, that on the most liberal scale of allowances plaintiff had received ample remuneration for her services, but allowed her \$129 out of \$141.50 paid into Court for special services rendered deceased in her last illness. Subject to above allowance, action dismissed with costs.

Action tried without a jury, at Cobourg, on the 7th and 8th March, against the executor of the late Selina Gillbard, to recover the value of services alleged to have been rendered by plaintiff to the deceased.

F. M. Field, K.C., and T. F. Hall, for the plaintiff.

A. M. Peterson and I. S. Fairty, for the defendant.

HON. MR. JUSTICE KELLY:—The plaintiff, a widow, is a niece of Selina Gillbard, who died on November 16th, 1910. The defendant is the executor of the will and codicil of Selina Gillbard, the will being dated December 4th, 1908, and the codicil February 17th, 1909. Probate of the will was issued to the defendant on February 13th, 1911.

The estate, as shewn by the inventory filed on the application for probate, amounted to \$24,493.77. In addition to bequests of some personal articles, the specific legacies amounted to \$15,857.54, of which more than \$8,000 was given to the brother, nephews, nieces (including the plaintiff) and a cousin of the testatrix, and the remaining part of these bequests and the residue of the estate go to objects chiefly of a religious, charitable and educational character.

At the time of her death, Selina Gillbard was eighty-one years of age. Her husband died in August, 1907, and as they were without children, and Mrs. Gillbard was then left alone, the executors of the husband's will (one of whom is the defendant), and some of her relatives, thought it inadvisable that she should be allowed to live alone, and it was, therefore, suggested that the plaintiff should take up her residence with Mrs. Gillbard. The plaintiff, at that time, was occupying a house for which she paid a rental of \$6.50 per month.

Mrs. Gillbard intimated that she did not require any person to live with her, but when pressed by those interested in her, she consented that the plaintiff should come to her, and volunteered the statement that she would do well by the plaintiff. There was no arrangement for plaintiff remaining with the deceased for any definite time, nor was anything said on either side about remuneration, except the voluntary statement of the deceased that she would do well by the plaintiff.

Plaintiff lived with deceased from August, 1907, until her death on November 16th, 1910, and during that time the services she performed consisted of going to the bank when deceased needed money or when she received any cheques or orders for money which she wished to have cashed or deposited, making purchases of provisions for the house, making up the bed which was used by the plaintiff and deceased, and attending to the furnace. All the other housework, except the laundry work, which was done by another person, was done by deceased, who refused to permit the

plaintiff to assist her in the performance of this work when at times the plaintiff offered her services.

The evidence shews that deceased was a person who rarely left her house, and associated but little with her friends or neighbours; she was careful of her money to an extent verging on penuriousness, but always paid promptly any debts she incurred, and at the time of her death owed nothing, except some small current accounts.

She had suffered from cancer in her finger, and in March, 1909, it became necessary to have it amputated. Notwithstanding this, however, she continued until a very short time prior to her death to perform her household duties to the extent which I have stated.

Plaintiff, in her evidence, complained that conditions of life with deceased were unpleasant by reason of the somewhat exclusive life she led, her economy in providing necessary food, and her persistence in preparing the food when she was suffering from cancer in her finger.

Though plaintiff did not ask for remuneration, Mrs. Gillbard, from August, 1907, until October 1st, 1910, paid her a monthly sum of \$10. Plaintiff states that deceased said this was for pin money.

By her will, deceased also gave plaintiff a bequest of \$2,000 and a contingent interest in a further sum of \$1,000. Plaintiff expected that deceased would have been more generous towards her, and she says she thought deceased would have "done by her" to the extent of about \$5,000 at least. This was a matter purely of expectation on her part, and her hopes were not based on any agreement, promise or suggestion by deceased, except the statement that she would do well by her.

After Mrs. Gillbard's death, plaintiff filed with the defendant a claim for services amounting to \$2,379, made up of a charge at the rate of \$60 per month for three years and one and one-half months beginning in August, 1907, (\$2,250), and at the rate of \$21.50 per week for the six weeks ending with Mrs. Gillbard's death.

Defendant refused to acknowledge the claim, except that he expressed an inclination to recognize plaintiff's right to some payment for the time from October 1st, 1910, until the death of the testatrix; the plaintiff's evidence being, and

it is not contradicted, that when she asked defendant if she had any chance of putting in a claim he replied she might for the last six weeks.

Defendant, while denying the plaintiff's right, has brought into Court \$141.50. He also stated in his evidence, that plaintiff, after the death of the testatrix, said she had been paid up to the 1st October.

Under the authority of such cases as *Walker v. Boughner* (1889), 18 O. R. 448; *Money v. Grout* (1903), 6 O. L. R. 521; and *Johnson v. Brown* (1909), 13 O. W. R. 1212, and 14 O. W. R. 272, the plaintiff cannot succeed, at least for the time down to October 1st, 1910, when the monthly payments ceased.

There having been no agreement or promise for payment of any definite amount, the most that plaintiff can claim for her services and trouble while living with deceased is the fair and reasonable value thereof. Apart from the monthly payment of \$10 paid promptly by deceased and accepted by the plaintiff for almost the whole period of her residence with deceased, the amount of the bequest made to her by the will was more than ample remuneration, on the most liberal scale of allowance, for the services of every kind which she performed, and any trouble she was put to, in any event down to October 1st, 1910.

In view, however, of the fact that there seems to have been some recognition of the special claim put forth for the last six weeks of the lifetime of the deceased, during part of which she was ill and perhaps required attention such as plaintiff had not previously been called upon to give her, it is not unreasonable that there be allowed to plaintiff out of the \$141.50 paid into Court the amount claimed by her for that period, namely \$129. Subject to this allowance to plaintiff, I dismiss her action with costs.

HON. SIR JOHN BOYD, C.

APRIL 12TH, 1912.

LEE v. CHIPMAN.

3 O. W. N. 1043.

*Annuity—Charge on Land — Land Sold — Payment into Court —
Application for Payment out of Lump Sum to Satisfy Annual
Payments—Resisted by Persons Entitled to Surplus.*

Land charged with payment of an annuity was sold under the direction of a Local Master and proceeds paid into Court. The report directed that the annuitant be paid an annual sum for maintenance, and that the surplus (if any) be distributed on her death.

Annuitant and one of the co-owners, by way of appeal from the report, applied to have a lump sum, considerably less than the capitalised value of annuity paid out to the annuitant in full satisfaction of such annuity. The other co-owners resisted this application.

BOYD, C., *held*, that all parties interested must agree to such an arrangement otherwise the Court could not sanction it.

Appeal dismissed with costs to the respondents out of the fund.

An appeal by the plaintiff and the defendant Robert Stevenson from a report of the Local Master at Cornwall in a proceeding for the partition or sale of land. Heard in Weekly Court at Ottawa.

D. B. MacLennan, K.C., for the appellants.

G. I. Gogo, for the other defendants.

HON. SIR JOHN BOYD, C.:—The testator has charged the land in question with the maintenance of his niece Bridget Lee without limiting such support to the income of the land and without requiring her to live on the place. That, of course, runs for the life of Bridget, who is about 60 years old and somewhat infirm, and the charge is upon the whole of the lands—not merely the rents and issues thereof.

She applied, being also a part owner of the lands, for a sale or partition, and this the Master has granted in the shape of directing a sale freed from the charge for maintenance. The sale has produced the net sum of \$4,315, which is all chargeable with what will be required for maintenance. The Master finds that she is entitled to receive \$500 a year for maintenance, and that the annual payment, if capitalized, would amount to more than the entire purchase money. The amount he fixes would be \$4,470, but in

his view it is not proper so to apply the fund, but directs all to remain in Court subject to the payment with accruing interest of the yearly sum and that no distribution of the surplus (if any) till her death.

The appeal is taken by her and one of the co-owners, Robert Stevenson, who owns five eighth shares of the land, she being owner of one-eighth, to have a lump sum paid out, and she is willing to have that fixed at \$3,600, which would leave a surplus of which Robert would get \$448 and she \$89 and the others, five in all, small sums under \$50 each.

The fund in Court represents the land and by retaining the fund in Court she gets precisely what was intended for her by the testator so long as she lives and so long as the fund lasts. As against the resisting co-owners who desire to take the chances of her living a less period than that accepted by the Master as her probable term of life, I do not think I should interfere with the report. There would be a change made in the terms and manner of payment by this process of commutation, and I do not think the Court would have jurisdiction so to determine against the opposition of any co-owner. Power to pay a lump sum is given by statute in certain cases of dower and the like, but not in case of a charge for maintenance created by will. That the consent of both sides is required is implied in the case of *Hicks v. Ross* (1891), 3 Ch. 499, and the general rule of the Court is, when charged land is sold, to set apart a sufficient sum to answer the claim for the annuity as it falls due from time to time: *Re Parry*, 42 Ch. D. 583, approved in *Harbin v. Masterman*, [1896] 1 Ch. 351. That the Master has done in this report.

It was argued that the terms of the judgment suggest a lump sum as being contemplated. But the Master who made the report was the judicial officer who issued the judgment for partition, and he does not so read his judgment, nor do I. The clause relied on is that the parties are, after paying costs, entitled to the proceeds of the sale in the following order and proportions; the said plaintiff is entitled to such an amount as may be sufficient in the aggregate to satisfy her claim and lien for support . . . and that the residue be distributed in proper proportion among the co-owners. The word "aggregate" does not mean one payment of one lump sum, but that a sufficient aggregate sum shall be held to

answer the claim as it falls due from time to time. The Master has carried out this direction and has provided fully for her claim during life. The annuitant is living with the defendant Robert, and no doubt it is for his interest to forward her claim, but I do not think that can be done by the Court as against the other parties interested.

The application should be dismissed with costs to be paid to the respondents out of the money in Court; but no costs to those supporting the appeal.

HON. MR. JUSTICE RIDDELL.

APRIL 15TH, 1912.

RE DINNICK v. McCALLUM & TORONTO.

3 O. W. N. 1061.

Municipal Corporation — By-law — Restricting Buildings—To be 25 Feet from Street Line—Application of By-law to Corner Lots—4 Edw. VII. c. 22, s. 19.

Question whether statute 4 Edw. VII. c. 22, s. 19 (Ont.) empowers a city to pass a by-law prohibiting the erection of a building within a certain distance of the street line in a "residential" district where the proposed building does not "front" on such street?

RIDDELL, J., *held*, that having regard to Ont. Judicature Act s. 81 (2) he had no jurisdiction to decide differently than *Toronto v. Schultz* (1911), 19 O. W. R. 1013, which he deemed to have been wrongly decided, therefore he referred the case to Divisional Court for decision.

Motion by D. L. Dinnick for a mandamus directed to the corporation of the city of Toronto and the City Architect to issue a permit to the applicant for the erection of an apartment house on the corner of Avenue road and St. Clair avenue, in said city.

W. C. Chisholm, K.C., for the applicant's motion.

H. Howitt, for the municipality, contra.

HON. MR. JUSTICE RIDDELL:—By the Act (1904), 4 Edw. VII. ch. 22, sec. 19, it was provided that "The councils of cities . . . are authorized . . . to pass and enforce . . . by-laws . . . to regulate and limit the distance

from the line of the street in front thereof at which buildings on residential streets may be built; such distance may be varied upon different streets or in different parts of the same street."

The city of Toronto purporting to act under the powers given by this statute, in December 1911 passed By-law No. 5891 containing the following provisions:

"No building shall hereafter be built or erected on the lots fronting or abutting on both sides of Avenue road, from St. Clair avenue to Lonsdale road, within a distance of forty feet from the east and west lines of the said road, and no person shall hereafter erect or build any such building in contravention of this By-law."

Avenue road is admittedly a "residential street" within the meaning of the Act.

Mr. Dinnick being the owner of the block of land at the north-east corner of St. Clair avenue and Avenue road, desired to build an apartment house at the corner, 60 ft. on St. Clair avenue and 130 ft. on Avenue road—see the rough plan attached. Drawing up all proper plans and specifications, he applied to the City Architect for a building permit which was refused solely on the ground that the proposed building would be in violation of By-law 5891.

Upon motion for a mandamus the city did not insist upon any technical objection—and the real matter to be decided is as to the validity of the by-law and its application to the present case.

It is admitted that this building "fronts" on St. Clair avenue.

The first and substantial contention of the applicant is that the legislation does not empower the city to pass a by-law prohibiting the erection of a building within a certain distance of a residential street unless the proposed building "fronts" on the street.

I do not agree with that contention—the power is given to limit the distance of buildings from the line of the street in front of the proposed buildings—the street is in front of the building, indeed, but that does not necessarily imply that the part of the building which is in common parlance called the front shall face or look toward the street.

Any side or face of a building is a front, although the word is more commonly used to denote the entrance side.

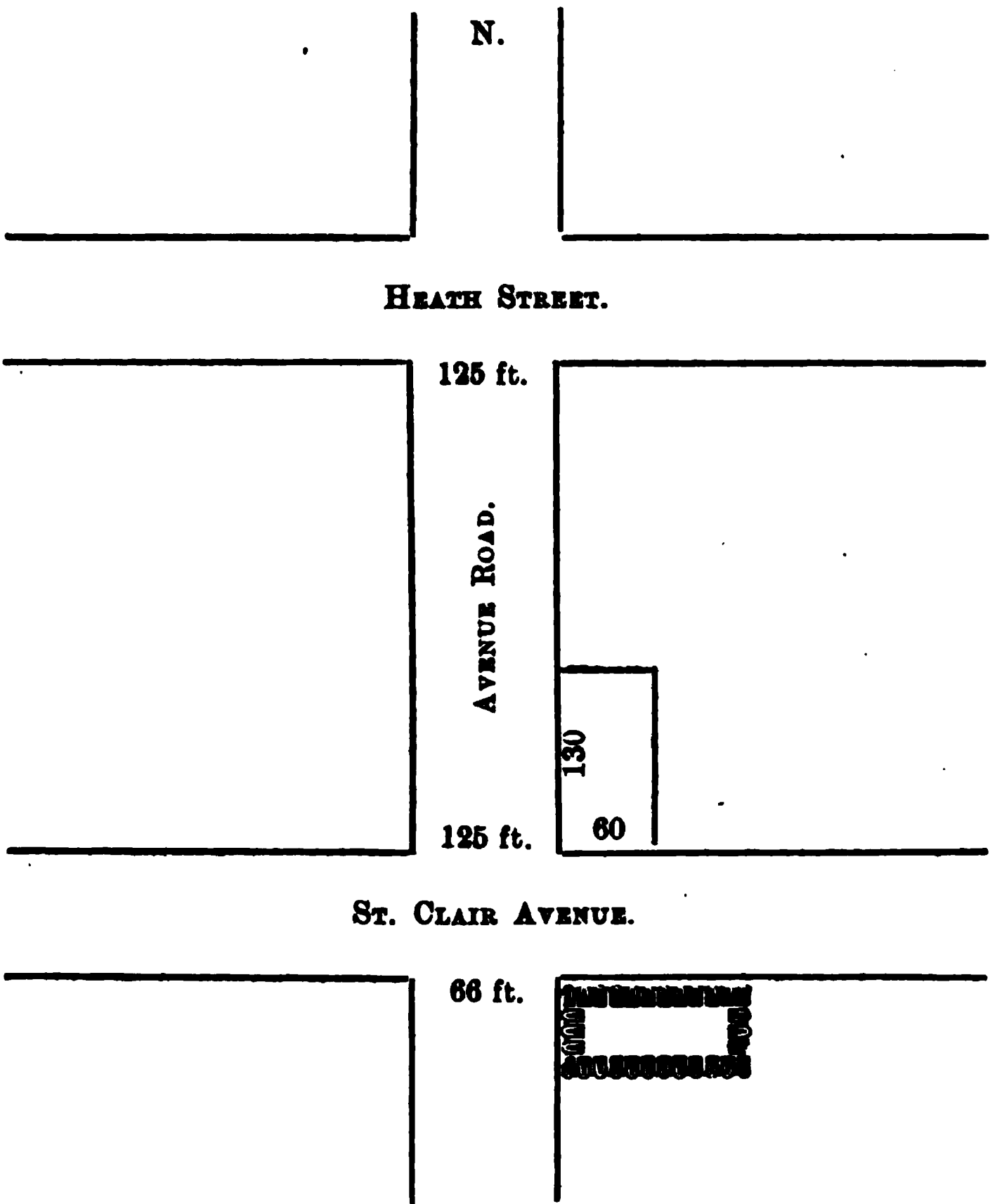
New Oxford Dict. sub voc. "Front" p. 563, col. 3, para. 6. Back-front, rear-front, the four fronts of a house are all terms in common use, and there is no reason why a building should not "front" on two, three or four streets, or that two, three or four streets should not be "in front thereof," all such streets would I think "confront" the building. New Oxf. Dict. "front," p. 564, col. 1, 10 (a).

We must look at the object of the legislation. It must be plain that the whole object was to enable the city to make residential streets more attractive, etc., by preventing building out to the street line—it would make a farce of the legislation if persons were to be allowed to build with the gable ends of their houses toward the street and up to the line of the street, claiming that they did not front on the street and therefore the street was not "in front hereof." And it would be no less absurd to say that if people could not build in that way in the middle of the block, they could at the corners. I am of the opinion that the power exists to prevent any buildings being placed within a distance (of course reasonable) of the line of a residential street.

Then it is said that this is in effect an expropriation of the applicant's land on St. Clair avenue, but this is an argument to be advanced to the Legislature and to the council.

The by-law is not perhaps very well drawn—it is not lots through which Avenue road runs and which therefore are "on both sides of Avenue Road" which are meant, but lots on each side. But the language is quite intelligible and can fairly be made to cover the lot of the applicant. "East and west lines" must of course be read distributively. No objection can be taken to the prohibition to "build on the lots fronting or abutting on . . . Avenue road," where the legislation authorizes a prohibition to build on any lot within the fixed distance of the line of the street.

I should dismiss the motion but that a decision of the C.J.K.B. has been brought to my attention, *Schultz v. Toronto* (1911), 19 O. W. R. 1013, which seems to be decided the other way. I am not at liberty to disregard O.J.A. sec. 81 (2), but as with the utmost respect I "deem the decision previously given to be wrong and of sufficient importance to be considered in a higher Court," I refer this case to a Divisional Court.



HON. MR. JUSTICE MIDDLETON.

APRIL 16TH, 1912.

LIVINGSTON v. LIVINGSTON.

3 O. W. N. 1066; O. L. R.

Partnership—Liquidation — Accounts — Report of Referee—Report Varied on Appeal—Costs.

Referee found that while a certain business carried on at Yale, Michigan, was not a partnership asset, yet as it was carried on by James Livingston as a competing business without the consent of his partner on the principle laid down in *Aas v. Benham*, 2 Ch. 255, he was liable to account for all profits made therein.

Referee found further, that as James Livingston had in the winding up of the partnership assets purchased through a nominee a certain oil mill belonging to the partnership he should account for all profits made on the sale of such mill.

Referee further allowed compensation to James Livingston for services rendered by him in the winding-up of the partnership.

MIDDLETON, J., *held*, that James Livingston was not liable to account for the profits of the Yale business as it was not a competing business, and further had been carried on with his partner's knowledge and consent.

That James Livingston need not account for the profits on the sale of the oil mill, but only on the excess of its actual worth over what he paid for it, which was in this case nil.

Atkinson v. Casserly, 22 O. L. R. 567, referred to.

That a surviving co-partner who assists in the liquidation of the partnership business is not entitled to remuneration therefor as he is not an express trustee under the Trustees Act, ss. 27, 40.

Order of Referee varied accordingly. No costs.

An appeal by the defendant and a cross-appeal by the plaintiffs from a report of George Kappele, Esquire, Official Referee, dated December 7th, 1910, upon a reference for taking accounts of a partnership which formerly existed between John and James Livingston.

John Livingston died in 1896, and this action was brought by his representatives against James Livingston.

Hon. Wallace Nesbitt, K.C., and H. S. Osler, K.C., for the plaintiffs.

I. F. Hellmuth, K.C., and J. H. Moss, K.C., for the defendant.

HON. MR. JUSTICE MIDDLETON:—The facts are fully set forth in the very elaborate and careful report of the learned

Referee, and I do not need to set them forth at length. Three distinct matters were argued, and these require to be separately dealt with.

In 1856 the late John Livingston and James Livingston came to Canada—young men—without any capital, and throughout their lives worked together as partners. From very small beginnings their business prospered, until, at the death of John the elder brother, in 1896, their joint property amounted to more than half a million dollars. During all this time the brothers appear to have had perfect confidence in each other, and each seems to have accorded to the other the greatest liberty with respect to the assets of the firm. There does not appear to have been any of the restrictions that would usually have existed in the case of a partnership. Each brother was practically allowed to do as he pleased. If he wanted money, he took it, and it was charged to him. There was no fixed capital. Each brother took what he needed, and what was left was used for the purposes of the business.

In the course of time new problems arose. Some members of the family were taken into the business. Ultimately, when McColl, a son-in-law of James, and Peter Livingston, a nephew, in 1887 desired to be taken into the business, James came to the conclusion that it was inadvisable to introduce into the concern any more relatives, and he told these young men to endeavour to establish a business for themselves in Michigan, and that he would assist them. It appears that John was asked to join in this, but declined. Finally an arrangement was come to between the two young men and James, by which they formed a partnership to operate at Yale, Michigan; and there is no doubt that James was the financial backer of this business. He desired to open a separate bank account for its financing; and, at the suggestion of the local bank manager, he opened a special account—"J. & J. Livingston Special." This was for the purpose of avoiding any discussion with the Bank's head office.

This business was carried on in Michigan for nine years before John's death, and from small beginnings grew to be a very substantial affair. There was no secrecy in connection with it. It had many dealings with the firm of J. & J. Livingston; and when the United States tariff was charged so as to make it unprofitable for certain branches to be carried on from

Canada, some business formerly done by the Canadian firm appears to have been substantially transferred to the American firm.

Annual statements were prepared by the accountant and were submitted to John Livingston. In none of these statements was the Michigan business treated as being an asset of the Canadian firm. No objection whatever was ever taken by John; in fact, from the beginning of the whole matter, each brother seems to have been entirely content to abide by the actions of the other.

After the death of John, those claiming under him appear to have felt themselves aggrieved by the dilatoriness of James in the winding-up of the partnership, and in 1901 an action for the dissolution of the partnership was brought. This action has dragged on to the present time.

In 1902, by consent, a judgment was pronounced for a dissolution in the ordinary form, save for the reservation to James of the right to make a claim to be remunerated for his services in connection with the liquidation: When the accounts were brought in under this judgment by the defendant, a surcharge was filed claiming among other things that this Yale business was an asset of the firm.

The other members of the Yale firm were not before the Court; yet both the Master to whom the matter was originally referred, and the learned Referee, have in their absence, assumed to deal with the question of ownership. The learned Referee has found that the business is and always was a separate business, and that it was not owned by the partnership; and no appeal has been had from this decision. The Referee has, however, found that the facts bring the case within the Rule of law laid down by Lindley in *Aas v. Benham*, 2 Ch. 255:

“It is clear law that every partner must account to the firm for every benefit derived by him without the consent of his co-partners from any transaction concerning the partnership, or from any use by him of the partnership property, name, or business connection. It is equally clear law that if a partner without the consent of his co-partners carries on a business of the same nature as a competing business with that of the firm he must account for and pay over to the firm all profits made by that business.”

Upon that assumption he has directed the defendant to bring into the partnership accounts all the profits received by him from the Yale business; and I understand this ruling to include not merely the profits which have actually been divided but profits which have gone to increase the capital of that concern.

Upon the argument before me it was admitted that this was too wide, and that James's liability, if any, to account, must be taken to have terminated upon the dissolution of the Canadian firm by the death of his brother John.

With great respect for the learned Referee, and realizing the advantage he had in hearing some portion of the evidence, I find myself unable to agree with him. I think the irresistible inference from the facts is that what was done by James was done with the assent and approval of John, and that therefore the rule has no application.

The case in this aspect is singularly like *Kelly v. Kelly*, 20 M. L. R. 579, decided since the learned Referee's report.

Had I not come to this conclusion, I would have hesitated long before determining that this business was a competing business within the Rule in question. When the business was established, the intention undoubtedly was to locate the young men far from home, where the business would not compete. They were to go to another country, and earn their own experience, and to establish an independent business for themselves: James became a partner in the Yale business for the purpose of remunerating him for his advice and counsel, and above all for his financial assistance. None of the cases upon competing business at all resemble this; and when the relationship which existed between the brothers is borne in mind, it seems to me, at least, that the case is very far removed from the facts of the cases which have given rise to the rule.

Upon the argument the Wurth-Haist business was mentioned as forming the subject of a separate ground of appeal. This was not argued in detail, as I was told that my decision in connection with the Yale business would govern it.

The second ground of appeal is in connection with an oil mill owned by the firm. After the dissolution and after the parties were at arm's length and represented by separate solicitors, negotiations took place between James Livingston

and the representatives of John for the purchase of this mill. James offered \$45,000. This was at first accepted, but the acceptance was withdrawn. The property was then offered for sale and was purchased by one Erbach, brother-in-law of James, for \$38,500. This sale was attacked before the Referee as being a sale at an undervaluation; but the Referee found upon the evidence that the sale was provident and the price realized was as much as the mill was worth. This finding is well warranted by the evidence. The valuation obtained on behalf of John's representatives, of something over \$48,000, was accompanied by the statement that no such price could be realized at a sale, but that it represented the actual value of the machinery as a running concern, and that the value placed on the buildings could not be realized because, apart from the oil business—for which the buildings were adapted—they had no utility.

This sale was further attacked upon the ground that James Livingston was in truth himself the purchaser, and that Erbach was a mere trustee for him and the referee has so found. A company was incorporated shortly after the purchase, and the property was turned over to it and this company has in its turn again sold to the Dominion Oil Company. The whole transaction was financed upon James Livingston's credit, and neither the purchaser nor any of the shareholders of the company have ever put any money into the concern. I do not think it was upon to the Master to enquire into the title of the purchasers, in their absence. The company, although the creation of James Livingston, and in one sense almost identical with him, was still a legal entity and could not be deprived of its property in its absence, but James Livingston can be made to account upon a proper basis if he had been guilty of wrongdoing.

Upon the appeal before me it was argued that the Referee's finding of fact was not correct. No doubt the finding is opposed to the oath of all those concerned; but actions frequently speak louder than words; and the conclusion appears to me irresistible that Livingston was in truth the purchaser.

I was urged to find that the correct inference from the evidence is that Livingston was not the purchaser at the sale, that Erbach was not a trustee for him, but that after

the contract had ceased to be executory Livingston had purchased from Erbach. The difficulty is that there is no evidence to support this contention, and that it is quite opposed to what is stated by every one. It was suggested that to find otherwise would be to impute some improper conduct or some ignorance of the law to the late Mr. Barwick. I do not think it is necessary to do this. I think it extremely unlikely that Mr. Barwick knew the facts. Livingston no doubt was advised, and no doubt knew, that he could not buy directly or indirectly; but nevertheless I think Erbach did buy for him; and everything that has taken place subsequently is consistent only with this view.

But I cannot at all agree with the consequences the Referee has attributed to this finding of fact. He says that the defendant must account to the estate for what was received by the James Livingston Linseed Oil Company when it went into the oil merger and transferred its property to the Dominion Linseed Oil Company.

I do not think this is the result. Before the transaction was attacked, Erbach had conveyed the property to the James Livingston Company. Their title has not been impeached. This transfer was at the same purchase price, and merely involved the assumption of the liability to pay the \$38,500 to the estate; so there was then no profit. Nevertheless, Livingston would be liable to account for the real value of the property which he had improperly purchased; but it has been found that the property sold for its full value and the finding has not been appealed from, and I think this ends his liability.

The consequences of the Referee's finding appear to be most serious. The James Livingston Oil Company carried on business for years. The buildings and machinery formed a very small part of its real assets. It was, as a going concern, transferred—probably at a fictitious price—to the Dominion Company; and it would be an extraordinary thing if the result should be that the estate should receive much more than the buildings and machinery were worth, and much more than these buildings and machinery cost or could be duplicated for. The question involved somewhat resembles that discussed in Lindley on Partnership, 7th ed., p. 634, concerning the liability of partners who carry on a partnership business, after their dissolution, and the profits made arise not so much

from the partnership assets which are used as from the skill, industry, and ability of the surviving partners.

The question of the measure of damages of a trustee who becomes himself a purchaser is dealt with in the Divisional Court in the case of *Atkinson v. Casserley*, 22 O. L. R. 567.

The third question is the propriety of the allowance made by the Referee to the defendant for his services in connection with the liquidation of the partnership. No doubt the defendant has rendered great services to the partnership, and as a matter of fairness and equity his services ought to be remunerated; but I fear that the law is against his claim. In England it is well settled though I have been unable to find any case indicating the precise ground upon which such a claim is disallowed. It may be because of the nature of the partnership contract; or it may be because in England trustees render their services gratuitously unless it is otherwise expressly provided in the trust deed. More probably there has never been any exact statement of the reason for the rule, because no English lawyer would think of placing the right of a surviving partner higher than the right of a trustee.

I can find no trace of any such allowance having been made in Ontario. The right, if it exists, must be based upon the Trustee Act. For convenience I refer to the Act in the Revision of 1897, which in this respect is similar to the Act of 1887, which probably applies. The sections dealing with this matter are 40 et seq. Section 40 provides that "any trustee under a ~~deed, settlement~~ or will . . . or any other trustee, howsoever the trust is created" shall be entitled to an allowance. These words, it seems to me, apply only to express trustees; and this impression is strengthened by reference to section 27, which provides that the expression "trustee" in the next five sections of the Act include "a trustee whose trust arises by construction or implication of law, as well as an express trustee." So, even if a surviving partner could be regarded as a trustee, he would not be within the provision of the statute relating to remuneration.

Besides this, there is authority for the statement that a surviving partner is not a trustee at all. *Knox v. Gye*, L. R. 5 H. L. 675. His position no doubt imposes certain obligations and duties which are in their nature fiduciary; but it is not every one who is subjected to these obligations and

restraints who can claim to be a trustee and entitled to all the privileges of a trustee. A wider construction has been adopted in the interpretation of the statutory provision corresponding with section 27. See *Re Lands Allotment Company*, 1894, 1 Ch. at p. 632; but I am precluded from applying this reasoning to the case in hand because of the view I entertain that section 40 applies only to express trustees.

The result is that both appeal and cross-appeal succeed to the extent indicated; and, as success is divided, there should be no costs.

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DIVISIONAL COURT.

APRIL 16TH, 1912.

COREA v. McCLARY.

3 O. W. N. 1071.

*Negligence — Dangerous Machine — Contributory Negligence —
Inadvertence—New Trial.*

Action claiming \$1,200 damages for the loss of three fingers cut off in a stamping and pressing machine in defendants' factory alleged to have been caused by defendants' negligence. At trial judgment was given plaintiff for \$700 and costs.

DIVISIONAL COURT *held* that if the workman gets into the wrong place or acts as he should not, his act being one without which the accident would not have happened, the master is not liable.

D'Aoust v. Bissett (1909), 13 O. W. R. 1115, followed.

Trial judgment set aside and new trial granted, as defendants' counsel said he would be satisfied with a new trial. Costs of the appeal to be to the defendants on any event. Costs of the last trial to be in the cause, unless otherwise ordered by the trial Judge.

An appeal by the defendants from a judgment of HON. SIR WM. MEREDITH, C.J.C.P., upon the findings of a jury, in favour of the plaintiff, in an action to recover damages for personal injuries sustained by the plaintiff while working in the defendants' factory.

The appeal to Divisional Court was heard by HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B., HON. MR. JUSTICE BRITTON and HON. MR. JUSTICE RIDDELL.

G. S. Gibbons, for the defendants, appellants.

E. M. Flock, for the plaintiff, respondent.

HON. MR. JUSTICE RIDDELL:—The plaintiff, an Italian, 21 years of age, was working on a stamping press stamping dipper bottoms. The operation was as follows—the workman

would take a tin "blank" up with his left hand, place it upon the plate of the machine in the reverse part of the die, put his foot upon the treadle of the machine which caused the obverse of the die to descend upon the blank and after pressing it into shape, rise leaving the blank; then the operator would with a small lever in his right hand raise the stamped tin from the reverse of the die, when he saw that the part of the machine carrying the reverse in the meantime had come to a standstill. This operation was repeated *de capo*.

The workman, the plaintiff, was thus working 22nd July, 1911, when by some means his hand got caught between the parts of the die, and he sustained permanent injury to his left hand. He says his foot was not on the treadle at the time of the accident—but he had it on the stool upon which he was sitting; and he does not know "why it dropped."

Much evidence was given that it was impossible for the die to come down unless the plaintiff put his foot upon the treadle—and some rather vague idea that a certain "tick, tick," or "click, click," which the plaintiff says he heard might indicate that a spring or key was "not clear of this connecting point," that the "click click there might keep on until it would wear the corners off in some . . . cases it would fetch the press down ahead of its time."

The machine was produced at the trial for the inspection of the jury. The following took place at the trial before the C. J. of the C. P. at London:—

His Lordship: I am told that you gentlemen desire to see this machine. Is that so?

Juror: Well, my lord, the jury wish to know the pressure it would take.

His Lordship: 35 lbs. is the statement.

Juror: When the machine is in working order and when it would be standing idle?

His Lordship: 35 lbs. was the pressure on the pedal necessary, according to the evidence of Mr. Upton. That is the only evidence before you. That 35 lbs. pressure was necessary to bring down the die. The machine, unfortunately has gone back to the shop. However, you could not tell the weight, you could only guess at it by trying it yourself. I suppose there is some machine to test the weight. However, if you think it important enough it can be sent for. To disengage the dog requires a pressure of 35 lbs.

Juror: The jury are of a little different opinion about the pressure. Some claim it would take more pressure when the machine is in motion, and some claim that it would take less pressure.

His Lordship: How could it possibly take any pressure when it is in motion? The operation is, when the pedal is pressed this dog is disengaged and that lets the die down and it comes down quickly. When it is coming down the dog has to be out. When the dog is in it cannot come down. That is the testimony. Perhaps the jurymen who has that view would state what is in his mind.

Juror: My lord, I just wish to state what I think about it. When you put your foot on that machine when it was here on the floor it did not seem to take more than five lbs. to spring. And the little spring in the wheel, you could touch it with your fingers and it would work as though it was no good at all. We are doubtful whether it would take 35 lbs. to do it or not.

His Lordship: That is the evidence, that it takes 35 lbs. pressure to bring it down. How would you be able to tell? I suppose you could test it with a weight. You would require the weight here too. The jury can go to the shop and look at it if they like.

Juror: I think, your honour, the wish of the jury is to see the machine working and test the pressure. We really think five or ten lbs. would set it off.

His Lordship: What is the relevancy of that to the questions you have to answer? Supposing it was 5, 10 or 15 lbs., what difference does that make?

Juror: To find out if the motion or jar would cause that to go into action, the jar of the stamp coming down on the machine.

His Lordship: It is down then and has to be lifted by taking the foot off the treadle. Is that not the way it is done? Then it goes up again. Perhaps they could see a similar machine, or could this be put in operation in a few minutes?

Mr. Gibbons: No, my lord, it has all been dismantled.

Mr. Flock: I have no objection to the jury seeing similar machines working in the factory.

His Lordship: Have you any objection to that Mr. Gibbons?

Mr. Gibbons: Not at all.

His Lordship: Then you may go down and see similar machines in operation.

Mr. Flock: I presume that there will be no conversation between the jurymen and the employees in the factory.

His Lordship: No. They can go there, and I think the best thing to do will be to let the jury hand in their answers in writing. They cannot get home to-night anyway. They will be here in the morning and confirm their answers, and then if I have to send them back I may do so, notwithstanding that they have separated. Do you agree to that?

Mr. Flock: Yes, my lord. Then I understand they view the machine now?

His Lordship: Yes, and then consider your answers to the questions, and when you have answered them hand them to the sheriff, and then be here at 10 o'clock in the morning. Then, if anything further has to be done it can be sent back to the jury to-morrow.

Mr. Gibbons: There is this about it my lord. The pressure of that machine may be different from others.

His Lordship: Yes. They may view the machine dismantled, and any other similar machine at the defendants' factory. The reporter will note that it is agreed that the jury will hand in their written answers to the questions to the sheriff's officer and then be discharged, but I may send them back to reconsider the case if I deem it necessary when they appear in Court in the morning to confirm their answers, the same way as I might have done if they had now separated.

(At four p.m. on Wednesday, 10th January, adjourned to 10 a.m. Thursday, 11th January, 1912.)

10 a.m., on the return of the jury to the court-room.

His Lordship: (Reading)—1. Was the machine on which the plaintiff was working a dangerous machine? Yes.

2. Was it practicable to securely guard the machine? Yes.

3. Was there a defect in the machine which caused the die to come down without the treadle being pressed upon by the operator? Yes.

4. If so, what was the defect? Weakness of the coil spring which operated the steel dog.

5. If the machine was defective was its defective condition not discovered or remedied owing to the negligence of some person entrusted by the defendants with the duty of seeing that the condition or arrangement of the machine was proper?

We firmly believe that McClarys are to blame in allowing men to operate these machines who are not competent.

That is not an answer to the question.

6. Was the plaintiff sufficiently instructed as to the way in which the machine should be operated so as to avoid accident to the operator? No.

7. If he was not, in what respect were the instructions insufficient? We firmly believe the operator was not properly instructed by his foreman.

8. Was the accident due, (a) to the absence of a guard? (b) to the plaintiff being insufficiently instructed how to operate the machine (c) to a defect, if any, in the machine, or to any other or either of these causes, and if so, which of them? Owing to the absence of a guard.

Was the accident due to the plaintiff having kept his foot on the treadle? No.

If so, was the plaintiff negligent in keeping his foot on the treadle? No.

Damages: \$700.

Gentlemen, you will have to retire and answer this question five if you can. You find that the machine was defective, and the question is: was the defect not discovered owing to the negligence of some person entrusted by the defendants with the duty of seeing that the condition or arrangement of the machinery was proper. According to the evidence there was a man whose duty it was to see that the machinery was in proper order. Now the answer to that should be either yes or no. And the next question, if so, whose negligence, you will have to state. That is 5 and 6.

(The jury retire. On their return to the court-room.)

His Lordship: The fifth question is now answered, yes. That should be the sixth. The questions are wrongly numbered. "The negligence of the foreman of this special department."

You are all agreed upon these answers, gentlemen?

Juror: Yes, sir.

His Lordship: Well, Mr. Gibbons, I suppose these answers mean a judgment for the plaintiff for \$700?

Mr. Gibbons: I hope it is not as bad as that, my lord. I move that there be judgment for the defence.

His Lordship: You must have a great deal of faith.

Mr. Gibbons: I have. There is no evidence to sustain some of these findings.

His Lordship: I do not know that. They inspected the machine.

Mr. Gibbons: They did not inspect the machine, my lord.

His Lordship: Did they not go to McClary's?

Mr. Gibbons: Yes, but they did not see the machine. They inspected a lot of other machines.

His Lordship: I cannot help that. You will have to move. I should not have found the same way. I should have thought it was the keeping of his foot on the treadle.
. . . ."

From all that took place it is to my mind perfectly clear that the jury have proceeded, not upon the evidence at all, but upon their own judgment (if it can be called a judgment and not a mere guess, as I think it was) in finding that the coil spring which held the steel dog was weak and that allowed the die to come down without the treadle being pressed upon by the operator.

It was this, and this only, which would justify them in finding (if they did find) that the plaintiff did not cause the die to descend by putting his foot upon the treadle.

It was quite clear that where Court or jury look at the locus of an accident or the machine which is said to have caused one, it is simply to enable the trial tribunal the better to follow the evidence—and that the verdict is still to be given upon the evidence. Nothing of the kind absolves the jury from their oath. "You shall well and truly try the issues joined between the parties and a true verdict given according to the evidence."

In any view it is if not inevitable at least nearly so, that it must have been found that the plaintiff himself in violation of his instructions, had put his foot on the treadle at the wrong time and that at the time of the accident he was not standing as he should have done.

In such case, the verdict would be for the defendants even if a possible guard had been left off.

In *Mercantile Trust Co. v. Canadian Steel Co.* I had occasion recently to consider the case of a workman by inadvertence or otherwise, putting himself in the wrong place. Following a Divisional Court case *Laliberté v. Kennedy Davis Co.*, there mentioned, I held that more inadvertence in disobeying an order did not excuse.

Then *D'Aoust v. Bissett* (1909), 13 O. W. R. 1115, followed as it has been in the Divisional Court, is authority for

saying that if the workman gets into the wrong place or acts as he should not, his act being one without which the accident would not have happened, the master cannot be made liable.

The defendants' counsel saying he would be satisfied with a new trial, I think that relief should be granted.

Costs of the appeal to be to the defendant in any event; costs of the last trial to be in the cause unless otherwise ordered by the trial Judge.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B., and
HON. MR. JUSTICE BRITTON:—We agree in the result.

DIVISIONAL COURT.

MAY 4TH, 1912.

REX v. PEMBER.

3 O. W. N. 957.

Municipal Corporations — Hawkers and Traders — Commercial Traveller at Hotel—Taking Orders for Goods to be Made to Order — Municipal By-law — Conviction under Quashed—Evidence—Belief of Witnesses—Finding Contrary to what is Sworn to.

DIVISIONAL COURT *held*, that persons living at hotels and there taking orders for goods to be made in a place outside of the municipality are not transient traders.

R. v. St. Pierre (1902), 4 O. L. R. 76; 1 O. W. R. 365, followed.

Per RIDDELL, J.—No Judge or other tribunal must accredit any witness or party, but no tribunal can find the existence of any alleged fact proved simply because a witness or party who is not believed swears that it does not exist.

R. v. Van Norman (1909), 14 O. W. R. 659; 19 O. L. R. 447, approved.

See *Gilbert v. Brown*, 15 O. W. R. at 678, 679.

An appeal from an order of HON. MR. JUSTICE MIDDLETON, quashing a conviction made by the Police Magistrate of the city of Brantford against the defendant for unlawfully doing business in the city of Brantford on 29th January, 1912, without first having obtained a license, contrary to the transient traders by-law.

The firm of Pember & Company carried on business in Toronto, dealing in hair goods and toilet articles. The accused, Frank R. Pember, was not a member of the firm, but travelled for it. His custom, which he followed on this

occasion, was to rent a room at an hotel at the place he visited, after previously advertising his advent, and then displayed samples of the wares in question to those attracted by his advertisement. He did not sell the articles exhibited; he took orders which were transmitted to the firm in Toronto and were there accepted or rejected by the firm. The question was, was that an infringement of the by-law of the town, which had been passed in the terms of the Municipal Act and its amendments? This narrowed itself to a question whether what was done constituted the accused a transient trader within the meaning of the statute.

A. J. Wilkes, K.C., for the informant.

J. Jennings, for the defendant.

HON. MR. JUSTICE MIDDLETON (3rd April, 1912):—I think the matter is concluded by the case of *R v. St. Pierre*, 4 O. L. R. 76, 1 O. W. R. 365. There it was held not to be an offence for a person temporarily at an hotel to take orders there for clothing to be made in a place outside the municipality, from material corresponding with the samples exhibited. Since that decision the Legislature has amended the statute with respect to hawkers, by adding to the interpretation clause defining that word, so that it now applies to those "who carry and expose samples or patterns of any such goods to be afterwards delivered within the county, to any person not being a wholesale or retail dealer in such goods, wares or merchandise."

Although the section of the statute relating to transient traders has been under consideration by the Legislature and has been amended, no corresponding amendment has been introduced, and I cannot find anything in the amendments which have been made which will make the reasoning in the case cited less applicable.

Mr. Wilkes argued very forcibly that what was done by the accused was within the mischief apparently aimed at by the statute and was just as unfair to those residing within the municipality and bearing the burdens of local taxation as any kind of trading. Unfortunately this argument must be addressed to the Legislature itself, as I cannot assume that it has not been adequately considered by the learned Judges who decided the *St. Pierre Case* after argument by eminent counsel.

The conviction should therefore be quashed, with cost to be paid by the informant. The usual order for protection, so far as the Magistrate is concerned, will be granted, and the \$100 paid into Court as security should be refunded.

The appeal to Divisional Court was heard by HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B., HON. MR. JUSTICE BRITTON and HON. MR. JUSTICE RIDDELL.

A. J. Wilkes, K.C., for the informant, appellant.

J. Jennings, for the defendant, respondent.

HON. MR. JUSTICE BRITTON (4th May, 1912):—It is a matter of complaint against the defendant, that he advertised his going to Brantford in a way that indicated a clear intention of going, with a stock of goods to be sold in Brantford.

I do not think so. The advertisement stated that he would be at the Kerby House in Brantford on the day named with the latest Parisian and American styles of ladies' hair goods shewn in the Dominion. He stated that all hair and scalp troubles will be diagnosed free of charge, and he had something to say for the comfort of bald men about the "Pember ventilated light weight toupees worn and recommended by the medical profession." Nothing about selling the goods or offering them for sale in Brantford. In the meagre evidence given before the Police Magistrate no sale was proved.

The witness, Mrs. Bush, apparently had no personal knowledge of what she was called upon to prove. She had a strong suspicion that opposition to her, in her business was coming from the outside, and naturally she wanted something done to repel the invader. The defendant's admission, whatever it amounted to, was not made until after the conviction. What he said was—and no objection was made to considering that as evidence—his going to Brantford was to exhibit samples, take orders for similar goods, and forward these orders, so that if orders accepted goods would be supplied from the factory outside of Brantford, by the employer of the defendant.

This, as I understand the evidence and business, is what commercial travellers, by the hundreds, are doing all over Ontario. I do not think that kind of business makes the commercial traveller a "transient trader" within the meaning of the Act or within the by-law of the city of Brantford.

In addition to the one argument addressed to us, counsel for complainant handed in a carefully prepared argument in

writing. I have read it with care, and I have consulted the cases cited—but I am unable to agree with the contention of appellant.

To constitute the offence charged the goods offered or sold, must be goods in Brantford—I agree with the learned Judge appealed from.

The appeal should be dismissed with costs.

HON. MR. JUSTICE RIDDELL:—The appeal should be dismissed upon the short ground that before the magistrate there was no evidence, *i.e.*, no legal evidence of any offence. It is said that the magistrate disbelieved the defendant: that may be so; no tribunal is compelled to believe anybody, witness or party: *R. v. Van Norman* (1909), 14 O. W. R. 659, 19 O. L. R. 447, at p. 449. But no tribunal can find the existence of any alleged fact proved simply because a witness or party who is not believed swears that it does not exist.

But as it is desired to have a decision on the facts alleged, I would say that Mr. Wilkes, in his able and exhaustive argument, has entirely failed to convince my mind that the case followed by my learned brother, *R. v. St. Pierre* (1902), 4 O. L. R. 76, 1 O. W. R. 365, is wrongly decided.

Nor am I able to draw any substantial distinction between that case and the present—to my mind there is no difference in principle between taking orders for an article to be supplied from a distant city whether what he produces to those from whom he hopes to secure orders is a picture of the article or a sample of goods from the counterpart of which the article is to be made or a sample of the article itself—in none of these cases are goods offered for sale.

The argument when reduced to its lowest terms was in reality based upon a supposed principle dear to those concerned in raising revenue for municipalities, etc., that *prima facie* everyone should be taxed for everything he does or leaves undone and on everything that he has.

But that is not yet the law. And the argument that “transient trader” should be held to include all who do any business in a municipality, who do not pay taxes in and to the municipality, must be addressed to the Legislature not to the Court.

The appeal should be dismissed with costs.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—I agree in the result.

COURT OF APPEAL.

NOVEMBER 20TH, 1908.

REX v. LEACH.

18 Can. Cr. Cas. 487.

Appeal—To Court of Appeal—From Unanimous Judgment of Divisional Court — Refusing to Discharge Prisoners on Habeas Corpus—Conviction under Liquor License Act—Certificate of Attorney-General—Necessity of before Appeal—Habeas Corpus Act, R. S. O. (1897), c. 83—Liquor License Act R. S. O. (1897) c. 245, s. 121.

COURT OF APPEAL *held*, that there is no appeal to the Court of Appeal from an unanimous judgment of Divisional Court, refusing to discharge on *habeas corpus*, prisoner held under conviction under the Liquor License Act unless the Attorney-General certifies that the point at issue is of such importance as to justify the appeal, and the Habeas Corpus Act, R. S. O. (1897), c. 83, does not apply to such appeals.

That a conviction for selling or keeping for sale liquor in contravention of a local option by-law is a conviction under the Liquor License Act for selling or keeping for sale "without a license" and is subject to the same limitations as to review on *certiorari* and *habeas corpus* as a conviction against a non-licensee in districts where licenses are issued..

Motion for the discharge of defendants William Leach, Andrew Fogarty and Joshua Warilow, by way of appeal from an unanimous judgment of Divisional Court, 12 O. W. R. 1016, 17 O. L. R. 643-667.

The defendants had been convicted by the police magistrate of the town of Owen Sound for a second offence of selling liquor without a license, a local option by-law being in force there.

An order for a writ of *habeas corpus* was granted by a Judge in Chambers, and a writ issued thereon on the 22nd October, 1908. *Certiorari* in aid was also issued. Upon the return before the King's Bench Divisional Court

THEIR LORDSHIPS (Hon. Sir Glenholme Falconbridge, C.J.K.B., Hon. Mr. Justice Britton and Hon. Mr. Justice Riddell) unanimously refused to discharge the defendant. See 12 O. W. R. 1016; 17 O. L. R. 643. Defendants then moved by way of appeal to the Court of Appeal.

The Ontario Liquor License Act, R. S. O. (1897), ch. 245, sec. 121, enacts in part that "an appeal to the Court of Appeal shall lie from a judgment or decision of the High Court or a Judge thereof upon any application to quash a

conviction made under this Act, or to discharge a prisoner who is held in custody under such conviction, whether such conviction is quashed or the prisoner discharged or the application is refused; but no such appeal shall lie from the judgment of a single Judge or from the judgment of the Court if the Court is unanimous, unless the Attorney-General certifies that he is of the opinion that the point in dispute is of sufficient importance to justify the case being appealed."

Section 143 enacts that "the sale or keeping for sale of liquor in any such municipality (where a local option by-law is in force) shall nevertheless be a contravention of secs. 49 and 50 of this Act, and all the provisions of this Act respecting the sale or keeping for sale of liquor in contravention of such sections and the penalties and procedure in reference thereto shall be of full force and effect in such municipalities notwithstanding such prohibitory by-law."

The appeal to the Court of Appeal was heard by HON. SIR CHARLES MOSS, C.J.O., HON. MR. JUSTICE OSLER, HON. MR. JUSTICE GARROW, HON. MR. JUSTICE MACLAREN and HON. MR. JUSTICE MEREDITH.

J. B. Mackenzie, for the prisoners, appellants.

J. R. Cartwright, K.C., for the Crown, contra.

THEIR LORDSHIPS held, that a certificate from the Attorney-General was essential to an appeal by the prisoner from such an unanimous judgment refusing to discharge the prisoners on habeas corpus.

That sec. 121 of the Liquor License Act governs in prosecutions thereunder notwithstanding the provisions of the Habeas Corpus Act, R. S. O. (1897) ch. 83.

That where an offence has been committed in territory subject to a local option by-law the conviction would, by virtue of the different enactments, be none the less a conviction made under the Liquor License Act, and not under the by-law.

Appeal quashed.

HON. SIR WM. MEREDITH, C.J.C.P.

APRIL 17TH, 1912.

RE MCGILL CHAIR COMPANY, MUNRO'S CASE.

3 O. W. N. 1074.

*Company—Winding-up—Contributory—Shares Issued at Discount—
Mistake of Facts or Law—Allotment of Half Share.*

Respondent was asked by McGill, a director of the company, to subscribe for shares and was promised $7\frac{1}{2}$ fully paid shares of \$100 each for \$500. He accordingly subscribed for the shares on these terms, paid \$500, and on January 16th, 1907, received a stock certificate for $7\frac{1}{2}$ shares expressed to be fully paid up. Subsequently he attended shareholders' meetings and acted generally as a shareholder of the company in respect of the $7\frac{1}{2}$ shares allotted him. In January, 1910, the company being in financial straits and some shareholders having been advised that similar allotments of bonus stock were illegal, a resolution of the shareholders was passed providing for the "recall into the company of all bonus stock" and pursuant thereto the respondent delivered up his certificate for $7\frac{1}{2}$ shares and received in lieu thereof one for 5 shares.

LOCAL MASTER *held* that respondent had acted under mistake of fact in believing the $7\frac{1}{2}$ shares to be fully paid up and that having repudiated the allotment as soon as he became aware of the mistake he was entitled to have it cancelled.

MEREDITH, C.J.C.P., *held*, that respondent's mistake was one of law, not of fact, in that he believed that the company had a right to issue shares to him at a discount of one-third their face value, and that having been treated by the company as a shareholder and acquiesced in such treatment he could not be relieved from liability in respect of the unpaid balance on his stock.

That the resolution of January, 1910, was *ultra vires* as a company cannot by any device whatever relieve a shareholder from his liability to pay the full amount due on his shares.

That the allotment of an half share to respondent was also *ultra vires*.

Appeal allowed, respondent placed on list of contributories in respect of two shares. No costs of appeal nor of hearing before Master.

An appeal by the liquidator from an order of the Local Master at Cornwall, dated 12th September, 1911, refusing to settle the respondent on the list of contributories in respect of two and one-half shares of the capital stock of the company, which was in liquidation under the Dominion Winding-up Act.

George Wilkie, for the appellant liquidator.

J. A. Macintosh, for the respondent, Munro.

HON. SIR WM. MEREDITH, C.J.C.P.:—The facts, as far as they are material to the question for decision, are undisputed and are that the respondent was asked by McGill, a director of the company, to subscribe for shares and was promised $7\frac{1}{2}$ fully paid-up shares of \$100 each for \$500; and he was advised

by Pitts, another director, to do so. The respondent agreed to take the shares on these terms, and accordingly subscribed for them and paid the \$500, receiving on the 16th January, 1907, a stock certificate describing the shares as fully paid-up.

This transaction was not an isolated one, for, as I understand, all the shares issued by the company were subscribed for and allotted on the same terms.

All parties acted in good faith and under the belief that the transaction was one into which the company might lawfully enter.

A resolution of the directors had been passed on the 31st October, 1906, "that services in connection with the promotion and organization of the McGill Chair Company be paid for in fully paid-up shares of the stock of the company, and that certificates be issued for the same."

Instead of allotting bonus shares to the persons who had rendered the services mentioned in the resolution, the plan was adopted of giving to each person who subscribed for shares three shares for every two for which he paid, or, at that rate; the additional 50 per cent. being provided by the shares, the issue of which was authorized by the resolution.

Although this was the plan adopted, Munro was treated in the books of the company as having subscribed for five shares, and paid for them with the \$500, and as holding $2\frac{1}{2}$ shares paid for by "services rendered in connection with promoting this company."

The respondent, on 24th April, 1908, gave a proxy to Mr. Campbell to vote for him at a shareholders' meeting to be held on the 27th of that month, and in it he described himself as the holder of $7\frac{1}{2}$ shares, and the respondent himself attended two of such meetings.

In January, 1910, the company, as the learned Master puts it, was in deep water financially.

Some of the shareholders to whom shares had been allotted on similar terms to those on which the respondent's shares were allotted to him, had about a year before this learned of the illegality of the transaction and demanded that the certificates which had been issued to them should be cancelled and new certificates issued for the shares for which they had fully paid in cash. These demands and occasional threats of legal proceedings to enforce them continued during the year preceding the passing of the resolution to which I shall next refer.

On the 14th January, 1910, at a meeting of the shareholders it was resolved:

"That all stock certificates which have been regarded in the light of bonus stock be recalled into the company, and whereas Thomas McGill performed special services in connection with the promotion of the company is desirous of retaining his stock that he may be exempt from the above resolution."

The respondent made no separate demand to have his bonus shares cancelled, but he was present at this meeting and voted in favour of the resolution.

In pursuance of this resolution the stock certificates except McGill's were called in and cancelled, and on the 22nd January, 1910, a new certificate was issued to the respondent for five fully paid up shares.

In the view of the Master the respondent in accepting the 7½ shares acted under a mistake of fact, and having repudiated the bonus shares, as the Master found, as soon as he became aware of the mistake, he was entitled to have the allotment of them cancelled as was done.

The mistake under which, as the Master thought, the respondent acted was in believing that the 7½ shares were as they were represented to be, fully paid up.

I am unable to agree with this view. The mistake of the respondent was not, in my opinion, a mistake of fact but a mistake as to the law.

It is not like the case of *Burkinshaw v. Nicolls* (1878), 3 A. C. 1004, where the company was held to be estopped from alleging that the shares were not fully paid up by the certificate so stating which it had issued and on the faith of which a third person had purchased the shares from the person described in the certificate as being the owner of them.

The respondent dealt directly with the company and knew that he was purchasing from it shares that had not been issued to any one else, but were being issued then for the first time, and the mistake under which he laboured was the belief that the company had a right to issue shares to him at a discount of one-third of their face value, for that was the effect of the transaction.

The position of the respondent is well described by what was said by Bowen, L.J., in *Ex parte Sandys* (1889), 42 C. D. 98, 117. The defendant in that case sought to have the register rectified by striking out her name in respect of

673 shares issued at a discount and the money she had paid in respect of them repaid to her.

"The question" (said the Lord Justice) "is whether the respondent whose name is upon the register has agreed to become a member. The original contract under which she applied for shares was not one that, as long as it rested *in fieri*, could have been enforced. She applied for shares to be given to her coupled with a condition which the law would not recognize, and the company had no right, disregarding the condition, to force upon her something which she had not asked for.

"If the case stood there, there would have been an end of the matter. The original contract was not one which could have been enforced, and in giving her the shares without attaching the condition to them, which she made a portion of her offer, the company were not giving her what she asked for.

"But the matter does not rest there, and this is just the point of the case. After her name was placed on the register and after she knew that her name was on the register, she did certain acts which were only consistent with an intention on her part to be created as a member of the company, and to treat herself as a member of the company in respect of these particular shares which had been so appropriated to her. If that is not evidence of an agreement to be a member, I really do not know what is."

Lindley, L.J., in the same case, p. 115, says "there never has been from the beginning to the end any mistake on her part about the facts. Such a mistake as there has been was a mistake by her, if any, as to the legal effect of what she has done. She has not taken these shares on the theory of expectation that they were in fact paid up to the full extent of £5. She knew all the time that they were not paid up and were never intended to be paid up. No doubt she thought, not knowing the law, that she never would have to pay the balance. Now the moment she gets these shares she finds she is on the register, what does she do? Does she repudiate? Assume she might, but does she? Quite the reverse; being still in ignorance, as she says, of her rights,—not in ignorance of any material fact, but being still in ignorance, or under an erroneous impression as to the legal effect of what she is about,—she treats herself as a shareholder in respect of these shares."

And Cotton, L.J., points out that there was in the case what was wanting in *In re Almada and Tirito Company*

(1888), 38 C. D. 415, namely the assent of the shareholder to her name being on the register in respect of the shares, and he distinguished *Beck's Case* (1874), L. R. 9 Ch. 392, saying that "the mistake on which the applicant was there relying was not a mistake in law but a mistake in fact," and after a reference to the facts of that case he asked, "If there had been a mistake of the general law of the country, he could not have been relieved. But what the Lords Justices held was, that he was entitled to have his name struck off the register because he had been put on under a contract entered by him under a mistake of fact, of which he was entitled to have the benefit."

In *Welton v. Saffery*, 1897, A. C. 299, the shares had been issued at a discount, and it was held that the holders of them were not released from liability in a winding-up to calls for the amount unpaid on their shares, for the adjustment of the rights of the contributories *inter se* as well as for the payment of the company's debts and the costs of winding up.

Speaking of the nature of the transaction, Lord Macnaghten said (pp. 321-2): "The truth is, as it seems to me, that there never was a contract between the company or the shareholders, on the one hand, and the persons to whom these discount shares were offered, on the other. There was an offer by the directors purporting to act on behalf of the company, but it was an offer of that which the company could not give, because the law does not allow it. There was an acceptance by the discount shareholders of that offer. But that offer and acceptance could not constitute a contract. Both parties acted under a misconception of law, and the whole thing was void. The company, however, placed the names of the discount shareholders on the register; they allowed their names to remain there until their remedy against the company was gone; and now they cannot be heard to say that they were not shareholders."

Re Sandys was followed by Britton, J., in *In re Cornwall Furniture Company* (1910), 20 O. L. R. 520, and his decision was affirmed by the Court of Appeal.

The question in that case was as to the position of persons to whom bonus shares had been issued, and dealing with it the Chief Justice of Ontario said (p. 533):

"It is now too late for these persons to ask to be relieved from their position as holders of the shares which they thus

acquired. No doubt they acted under a mistaken belief, but that fact does not suffice to entitle them to be relieved. Having assented to the allocation of the shares and accepted the position of holders in respect of them, they cannot be relieved from the liability attached to the position simply because they made a mistake in the general law. There is no question that the facts were fully known to them."

In the *Cornwall Case* the question arose after an order for a winding up of the company had been made, and I refer to it only for the purpose of shewing that a mistake such as that under which the respondent laboured is a mistake as to the law and not a mistake as to facts.

In the English cases it will have been noticed that the assent of the shareholder to his name appearing on the register of shareholders is spoken of as the determining factor for fixing him with liability as a shareholder; and in the case at bar there is nothing to shew that the respondent knew that his name had been entered in the register as the holder of the 7½ shares. That circumstance is not, in my opinion, material as the real determining factor is his knowledge that the company treated him as a shareholder, and his acquiescence in being so treated, and that I take to have been the opinion of the Chief Justice of Ontario, judging from his observations in the *Cornwall Case* which I have quoted, "Having assented to the allocation of the shares and accepted the position of holders in respect of them, they cannot be relieved."

The Act under which the company was incorporated, the Ontario Companies Act, contains no provision similar to section 25 of the English Companies Act of 1867, which provides that every share "shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash unless the same shall have been otherwise determined by contract duly made in writing and filed with the registrar of joint stock companies at or before the issue of such shares."

It is clear, however, from *Ooregum v. Roper*, 1892, A. C. 125, that apart altogether from the provisions of section 25, the issue of shares at a discount is *ultra vires* a company whose capital is divided into shares of a fixed amount, and the liability of the shareholders of which is limited to the amount unpaid on their shares. See the observations of the Lord Chancellor, p. 134, Lord Watson, pp. 135-6, Lord

Macnaghten, p. 145, and Lord Morris, p. 148. See also *Welton v. Saffery* (*infra*).

There is, in my opinion, no reason why these and similar cases should not be applicable to companies incorporated under the law of Ontario.

The Ontario Companies Act requires that the number of the shares and the amount of each share shall be stated in the application for incorporation (sec. 10), and sec. 33, provides that "not less than 10 per cent. upon the allotted shares of stock of the company shall by means of one or more calls formally made be called in and made payable within one year from the incorporation of the company, the residue when and as by the by-laws of the company direct," and although there is no express provision limiting the liability of shareholders to the amount unpaid on their shares, sec. 37 impliedly at all events so limits it, and the constitution of a company incorporated under that Act possesses, therefore, both of the features which led to the conclusion that it was *ultra vires* of a company incorporated under the English Act of 1867, to issue shares at a discount; and in the reported cases in this province the English decisions have been applied notwithstanding the absence of any provision in our Companies Acts similar to sec. 25 of the English Companies Act.

For these reasons I am of opinion that the respondent was not entitled upon the ground of mistake to be relieved from his position of shareholder in respect of the $2\frac{1}{2}$ shares, and it follows, I think, that the resolution of the 14th January, 1910, and what was done under it, was *ultra vires* the company.

In the *Ooregum Case* the Lord Chancellor (at p. 133) said: "It seems to me that the system thus (i.e., by the Companies Act), created by which the shareholders liability is to be limited by the amount unpaid upon his shares, renders it impossible for the company to depart from that requirement, and by any expedient to arrange with their shareholders that they shall not be liable for the amount unpaid on the shares, although the amount of those shares has been, in accordance with the Act of Parliament, fixed at a certain sum of money. It is manifest that if the company could do so the provision in question would operate nothing. I observe in the argument it has been sought to draw a distinction between the nominal capital and the capital which is as-

sumed to be the real capital. I can find no authority for such a distinction. The capital is fixed and certain, and every creditor of the company is entitled to look to that capital as his security."

In *Bollerby v. Rowland & Marwood's Steamship Co.* (1902), 2 Ch. D. 14, the Master of the Rolls, quoting this passage from the speech of the Lord Chancellor, added (p. 26): "and the opinions of the other learned Lords are to the same effect. The justification of forfeitures rests upon the statute itself, and I think that since *Trevor v. Whitworth* (1887), 12 A. C. 409, no authority can be relied on as justifying a surrender having the effect of reducing capital which cannot be supported as a form of forfeiture.

Stirling, L.J., in the same case (p. 29), expressed the opinion that "the weight of authority is in favour of the view that forfeiture, which is specifically mentioned in the Act of 1862, stands on a special footing, and that surrenders can only be supported in circumstances which would justify forfeiture."

Cozens-Hardy, L.J., p. 31, dealing with the same question says: "When, however, the transaction involves as in the present case the release by the company to the shareholders of uncalled capital on their shares, it seems to me that it is within *Trevor v. Whitworth*, a reduction of capital not sanctioned by law."

"The decision of the House of Lords in the *Ooregum Case*, that shares in a limited company cannot be issued at a discount, involves the principle, that the company cannot by any device relieve a shareholder from the liability to pay the full amount due on his shares. This would be the result, if the shares had been retained by the plaintiffs, instead of being surrendered to the company. But the fact that in consideration of the release the shares were surrendered seems to me to render the transaction no better. Uncalled capital is part of the assets of the company . . . The company, therefore, parted with £415, a portion of its assets, in consideration of the acquisition of the shares. This was a purchase of the shares, and is directly within the authority of *Trevor v. Whitworth*."

I do not understand how half a share came to be allotted. I find no warrant in the Act to allot anything less than a share, and I do not think that the liability which I hold attached to the respondent extends to the half share which the

company assumed to allot to him. This point was not taken on the argument and counsel may speak to it if the appellant contends otherwise; and subject to this an order will issue allowing the appeal and substituting for the order of the Local Master an order that the name of the respondent be put upon the list of contributories in respect of two shares.

There will be no costs of the appeal or of the application to the Local Master.

Since writing the foregoing, my attention has been called to a recent decision of my brother Middleton, *Re Mathew Guy Carriage and Automobile Co., Thomas' Case*: 1912, 3 O. W. N. 902, which it is said is opposed to the view I have expressed as to the effect of the resolution to cancel the shares and the action taken upon it. I find, however, on inquiry from my learned brother that it is not, and that in that case the contract to take the shares was still executory at the time the resolution to cancel the bonus shares was passed.

DIVISIONAL COURT.

APRIL 16TH, 1912.

McKENZIE v. ELLIOTT.

3 O. W. N. 1083.

Contract—Building Contract—Action for Price—Question whether Contract was Abandoned—Onus of Proof.

An action to decide whether a barn built by plaintiff for defendant was built under the signed contract or if the signed contract was abandoned, and a new arrangement substituted to entitle the plaintiff to a sum in excess of the \$7,000 agreed. Master in Ordinary dealt with the case from the viewpoint of fact, and held that the writing was indefinite and if in force as to price it was in force for all purposes and vice versa.

BOYD, C., *held*, 19 O. W. R. 726; 2 O. W. N. 1364, that the Master in Ordinary erred in his appreciation of the whole body of evidence and its application to the controversy in its legal aspect, and the original contract was but slightly varied. Plaintiff entitled to \$8,000 and costs.

DIVISIONAL COURT affirmed above judgment, RIDDELL, J., *dissenting*.

An appeal by the plaintiff from an order of HON. SIR JOHN BOYD, C., (1911), 19 O. W. R. 726, 2 O. W. N. 1364, setting aside the report of the Master in Ordinary, dated May 15th, 1911.

The appeal to Divisional Court was heard by HON. SIR WM. MEREDITH, C.J.C.P., HON. MR. JUSTICE TEETZEL and HON. MR. JUSTICE RIDDELL.

W. Mulock, for the plaintiff, appellant.

F. E. Hodgins, K.C., for the defendant, respondent.

HON. SIR WM. MEREDITH, C.J.C.P.:—The argument of the learned counsel for the appellant fails to satisfy me that the learned Chancellor erred in his conclusion that the barn was built under the terms of the written agreement as modified by the subsequent verbal arrangement by which the size of the barn was reduced by 20 feet and the materials of another barn of the respondent were to be used in the construction of the new barn, and an allowance was to be made to the respondent for the value of these materials and the services of an architect dispensed with.

The facts and the grounds upon which the Chancellor proceeded are fully set out in the report of his judgment, and it is unnecessary to repeat or to say more than that I concur in his conclusion, and in the main with the reasoning on which it is based.

It is not open to question that at one time there existed a contract in writing between the parties for the building by the appellant of a barn for the respondent, and the onus in my opinion rested upon the appellant to establish that it had been, as he contended, entirely abrogated; and that onus was not satisfied. In my view the evidence does not establish that the contract was rescinded, but shews that it was only changed in some of its terms, and there exists no ground upon which the claim put forward by the appellant that in doing the work he acted as the agent of the respondent.

I may remark that when the appellant is left to tell his own story as to what took place when the arrangement, whatever it was, was made, his account of what took place does not differ from the respondent's account of it. On p. 27, in answer to the question by the Master, "What happened then?" his answer was "He said he was not satisfied with the contract. He wanted to change the size of the barn and work in the material out of the old barn," and it was only when the very suggestive question, "What did he say he wanted to do with the contract you and he had both signed?" was put to him that anything was said as to rescinding the contract, and his answer to that question was "To break the contract

that he was not satisfied with it and me to build the barn to suit him;" and again, on p. 49, referring to the same matter, he was asked by counsel for the respondent, "You did not ask Mr. Elliott for anything and nothing was said except that you were to erect the barn and that he gave you \$100, and that the barn was to be shortened by 20 feet, and the materials of the old barn used in it?" to which his answer was "Yes;" he was then asked "Anything more?" to which he replied, "Well, I cannot recall anything in particular," and it was not until counsel somewhat injudiciously put the further question "You would not swear, Mr. McKenzie, that Mr. Elliott told you that he wanted to break that contract?" that anything was said about breaking the contract, his reply to that question being, "I certainly will. That was his words to me, that he wanted to break the contract."

It is probable, I think, that the extent of the respondents interference with the details of the work was considerably magnified by the appellant and that the respondent was unwilling to admit as much interference as actually took place, but justice will be done by an allowance for any increased cost of the work occasioned by that interference, and it is probable, and indeed the respondent admits, that he ought to pay a considerable sum for extras.

The learned Chancellor's view was that probably the legal effect (i.e., of the arrangement) was that the building as diminished was to be built at the same price, \$7,000, as no stipulation was made for a reduction.

I agree that there was no express stipulation, but I do not see why such a stipulation was not implied. The sole purpose of reducing the dimensions was to reduce the cost, and it does not seem unreasonable, in order to give effect to the object which the contracting parties had in view, to imply a stipulation that there should be a reduction of the contract-price proportioned to the reduction in the size of the barn.

The Master, I think, erred in fixing the amount of the plaintiff's claim, even if it were to be arrived at on a quantum meruit. He in effect treated the appellant as the agent of the respondent and allowed all the expenditures he had made and a percentage on the amount expended for the appellant's services, instead of fixing it on the value of the work done; and the evidence satisfies me that upon that basis the sum suggested by the Chancellor as a proper sum

to be allowed—\$8,000—is quite as much as the appellant is entitled to.

Upon the whole, I am of opinion that the appeal should be dismissed with costs, but in order that if possible the litigation may not be further prolonged, I think it will be well if the parties would adopt the suggestion that \$8,000 be fixed as the full price of all the work on the terms mentioned by the Chancellor.

HON. MR. JUSTICE TEETZEL:—I agree.

HON. MR. JUSTICE RIDDELL:—The plaintiff, a builder, built a barn for the defendant and claims as upon a quantum meruit; the defendant sets up a contract which he says governs in substance, and he says that this contract was substantially followed. He in effect contends that the work done should be charged for at a price fixed in this way. Take a barn as per contract as worth \$7,000, add a fair price for anything extra in the barn actually built and subtract for anything not in the barn actually built which would be in the barn according to contract.

It seems beyond question that the plaintiff had plans drawn up by architects, that he took these plans to the defendant and shewed them to him—that the plaintiff procured a blank form of contract and filling in some of the blanks, he and the defendant signed it as a contract to build a barn for \$7,000. It also seems beyond question that the defendant decided that he would not have a barn of the size contemplated by the plans.

What then took place in great measure depends upon the credit to be given to the parties—and that could best be determined by the Master who saw them both. Nothing is much more dangerous than to judge of the credibility of a witness, from the appearance of his evidence when reduced to black and white. The Master gave credence to the evidence of the plaintiff, and I cannot find anything in the evidence to justify us in holding that the Master was wrong.

“According to the well established practice in Ontario” the Master is “the final Judge of the credibility of . . . witnesses.” *Booth v. Ratte*, 21 S. C. R. 637, 643; *Hall v. Berry* (1907), 10 O. W. R. 954; *Fawcett v. Winters*, 12 O. R. 232.

The decision of the Master that the contract was abandoned and the work done under an open arrangement without a written contract, should not in my opinion, have been interfered with. I do not intend going over the evidence in detail; the question is one purely of fact and no good end could be attained by setting out the evidence at length.

The plaintiff being entitled as upon a quantum meruit, it remains to consider the amount which he should be allowed—and here again the Master has had an opportunity of seeing the witnesses. I am unable to find anything in the case which would justify me in saying that the Master was wrong—and, therefore, think the appeal should be allowed and the report of the Master reinstated and that the plaintiff should have his costs throughout.

HON. MR. JUSTICE TEETZEL.

APRIL 17TH, 1912.

THE NATIONAL TRUST CO. v. THE TRUSTS AND
GUARANTEE CO.

3 O. W. N. 1093; O. L. R. .

*Company — Winding-up — Mortgage to Trustee for Bondholders —
Covered Chattel Property—Not Registered as Required by Act—
Book Debts—Rights between Liquidator and Trustee.*

Plaintiff as trustee for bondholders brought action against defendant liquidator of Raven Lake Portland Cement Co. under Dominion Winding-up Act for an account of moneys received by defendants in respect of the sale of the assets, goods, chattels, book debts and choses in action mortgages to plaintiff or in alternative for damages for conversion.

The mortgage taken by plaintiff as trustee for bondholders to secure the company's bonds covered "all and singular its undertakings then made or in course of construction or thereafter to be constructed, together with all properties real or personal, tolls, incomes or sources of money, rights, privileges and franchises owned, held or enjoyed by it then or at any time prior to the full payments of the bonds thereby secured." A later clause provided that the mortgage was not to be registered as a bill of sale or chattel mortgage, and it was not so registered.

TEETZEL, J., *held*, that the plaintiff could not recover in respect of the personal property and chattels of the company as the mortgage was not registered as required by the Bills of Sale and Chattel Mortgage Act, and was, therefore, void as against creditors.

Johnston v. Wade, 17 O. L. R. 372, distinguished.

That plaintiff could recover in respect of any book debts owing at the date of the assignment as the language of the mortgage was sufficiently broad to cover present and future books debts.

That the liquidator was not only entitled, but bound to contest plaintiffs' claim on behalf of company's creditors.

Judgment for plaintiffs for book debts; action otherwise dismissed. No costs of action.

Action tried at the Toronto non-jury sittings on March 11th, 1912. See former reports of case in 19 O. W. R. 631, 24 O. L. R. 286, 18 O. W. R. 519, 2 O. W. N. 761, 830, 1314.

R. C. H. Cassels, for the plaintiff.

W. Laidlaw, K.C., for the defendant.

HON. MR. JUSTICE TEETZEL:—The plaintiff is trustee for bondholders of the Raven Lake Portland Cement Company, hereinafter referred to as the company, and the defendant is liquidator of that company under the Dominion Winding-up Act.

By mortgage dated 13th September, 1904, the company duly granted, assigned, transferred and conveyed and mortgaged to the plaintiff in trust, subject to a certain other mortgage, all and singular its undertakings then made or in course of construction or thereafter to be constructed, together with all the properties, real or personal, tolls, incomes and sources of money, rights, privileges and franchises owned, held or enjoyed by it then or at any time prior to the full payment of the bonds thereby secured, to secure payment of the bonds mentioned in the mortgage amounting to \$50,000 and interest. The lands are specifically set out in a schedule attached to the mortgage. The mortgage also purports to cover "all machinery of every nature and kind including all tools and implements used in connection therewith which are now or which may hereafter, during the currency of this mortgage, be brought upon the said lands or into any of the buildings thereon, including all machinery used or to be used in the manufacture of cement and plant and tools connected therewith." . . . "The dredge at Raven Lake, the machinery, tools, etc., to be deemed fixtures for the purpose of this mortgage, whether the same shall be actually affixed to the said lands or buildings or not."

The 23rd and 24th clauses read as follows: "And it is further hereby declared and agreed, for the purpose of this mortgage security, that all machinery, plant and personal property of the company are to be considered fixtures to the realty, and it is expressly understood and agreed that this mortgage is not to be registered as a bill of sale or chattel mortgage. Provided, and it is hereby declared, that the company may at all times, so long as there is no default in payment of principal or interest on the said bonds or otherwise, hereunder sell and dispose of its manufactured

products in the ordinary course of business free from the lien of this mortgage."

Each bond, a copy of which is set forth in the mortgage, contains this clause: "This bond is one of a series amounting in the aggregate to fifty thousand dollars, and is secured by a mortgage duly executed according to law, conveying to the National Trust Company, Limited, as trustee, all the present and future real and personal properties, rights, franchises and powers of the Raven Lake Portland Cement Company, Limited, as by reference to the said mortgage will more fully appear, the nature of the security, the rights of the holders of the bonds secured by it, and the terms of the trust appear by the said mortgage, to which reference is hereby expressly directed, and which terms are made a part of this bond."

The mortgage contains the usual provisions for redemption, and that until default the mortgagors shall be permitted "to possess, operate, manage, use and enjoy the mortgage premises, and to take and use the rents, incomes, profits and issues thereof in the same manner and to the same extent as if these presents had not been executed."

It also contains elaborate provisions enabling the mortgagees, upon default, to take possession and operate or sell the mortgaged premises.

The mortgage was duly registered against the lands covered thereby, but was not filed as a chattel mortgage, nor was anything done to comply with sections 2, 3, or 23, of the Bills of Sale and Chattel Mortgages Act, as from the beginning the plaintiffs have assumed that the provisions of that Act did not apply to the mortgage.

On September 14th, 1907, the company made a general assignment for the benefit of its creditors to Henry R. Morton, who entered into possession as assignee and proceeded to realize upon the personal estate of the company.

By order dated September 20th, 1907, made under the Dominion Winding-up Act, the company was declared to be insolvent, and ordered to be wound up the defendant appointed provisional liquidator and reference directed to Mr. McAndrew as Official Referee, to appoint a permanent liquidator, and to take all necessary proceedings for and in connection with the winding up of the company. On 30th November, 1907, defendant was appointed permanent liquidator.

The appointment of Liquidator having superseded that of the assignee, the former took possession of all the assets of the company and proceeded to convert the same into money and to collect outstanding accounts and property to administer the affairs of the company.

By September 8th, 1910 (date of Liquidator's statement of receipts and disbursements), the defendant had subsequently realized upon all the convertible assets of the company, and so far as I can judge from the statement, those assets consisted chiefly of manufactured cement, bricks for cement, coal, and book accounts and cash received from the assignee as proceeds of goods sold and book debts collected before he handed the estate over to defendant. It does not appear that machinery or anything in the nature of fixtures was realized upon by defendant.

So far as the evidence discloses the first claim made by the plaintiff to assets and proceeds of assets in defendant's hands, was by a notice in October, 1909, in which plaintiff claims all the proceeds of the assets of the company realized by the defendant as liquidator, and all other assets of any which may be unrealized in the hands of the liquidator, upon the ground that all such assets belonged to plaintiff by virtue of above recited mortgage.

Nothing appears to have been done under this notice until 25th September, 1910, when joint objections to plaintiff's claim were filed and served by the defendant and the Imperial Plaster Company, Limited, the latter "on behalf of themselves and all other creditors of the Raven Lake Portland Cement Company, Limited" upon the ground among others that the mortgage was void for non-compliance with the Bills of Sale and Chattel Mortgages Act and that the assets were not covered by the mortgage. Instead of adjudicating upon the claim and the objection therein the learned Referee on 3rd November, 1910, granted leave to issue a writ and prosecute an action against defendants "in respect of goods and chattels and book debts and choses in action formerly belonging to the Raven Lake Portland Cement Company, Limited, or the proceeds thereof claimed by the National Trust Company, Limited."

This action was accordingly brought, but it is to be observed that the other contestant, the Imperial Plaster Company, Limited, was neither made a party to the action, nor was its objections adjudicated upon by the Referee.

An application was made to the Master in Chambers by the defendant, to have that company added as a party defendant, but the motion was refused and the refusal was sustained on appeal without prejudice to an application being made to the trial Judge if it should appear to him that the proposed defendant is a necessary party to enable him to adjudicate upon the title to the money in question.

The statement of claim sets forth the mortgage, alleges default and non-payment, and charges that, notwithstanding the plaintiff's rights under the mortgage, the defendant took possession of certain goods and chattels, the property of the said company and subject to the plaintiff's mortgage, and sold the same, and also collected certain book debts and choses in action, the property of said company, and wrongfully converted the same to its own use and refuse to deliver the same or account for the proceeds thereof to the plaintiff, and plaintiff claims an account of the same or, in the alternative, damages for conversion of said goods, chattels and book accounts.

The defendant pleads the winding up proceedings, disclaims any personal right or interest in the property, denies unlawful conversion, submits that the Imperial Plaster Company, Limited, on behalf of themselves and all other creditors, should be added as a party defendant, and repeats the objections to plaintiff's claim set forth in the notice of contestation above referred to.

The following questions arise for determination:

(1) Does the mortgage bind the goods and chattels in question, notwithstanding the provisions of the Bills of Sale and Chattel Mortgages Act?

(2) Does the mortgage bind the book accounts in question, or any of them?

(3) Is the defendant, as liquidator, entitled to contest the plaintiff's claim on the ground that the provisions of the Bills of Sale and Chattel Mortgages Act were not complied with?

(4) If the defendant is not so entitled, should the Imperial Plaster Company, Limited, be added as a party defendant?

Upon the first question, counsel for plaintiff submits that the mortgage creates a floating security, and as such extends to all personal property of the company, whether existing at the date of the mortgage or subsequently ac-

quired, and relies upon the decision in *Johnston v. Wade* (1908), 17 O. L. R. 372, to support his argument that the provisions of the Bills of Sale and Chattel Mortgages Act are not applicable to this mortgage.

In that case there was not, as in this case, a mortgage to secure bonds, but the bonds upon their face and in the conditions endorsed upon them (see p. 390), declared that all the company's "property, real and personal," rights, powers and assets of every kind and description present and future including its uncalled capital," were charged with the payment of the bonds.

The decision in that case was, that such bonds issued pursuant to a by-law passed under the provisions of the Companies Act, then R. S. O. (1897), ch. 191, sec. 49, were not mortgages or conveyances intended to operate as mortgages of goods and chattels of an incorporated company within the meaning of the Bills of Sale and Chattel Mortgages Act, and were not, therefore, void as against the defendant, the assignee of the company, for the benefit of creditors, because not registered under the provisions of that Act. After reviewing the authorities in England, which hold that such debentures need not be registered under the English Bills of Sale Act in order to be effective against other creditors, and referring to the language of sec. 2 of the Bills of Sale and Chattel Mortgages Act, R. S. O. (1897), ch. 148, the Chief Justice of Ontario (p. 386), observes: "The words 'mortgage or conveyance intended to operate as a mortgage of goods and chattels' describe instruments of a well-known character. They do not convey the idea of debentures of the kind in question here, which pass no property in the goods and chattels to the holder, and confer upon him no right to take possession of them or interfere with them in any way, except through the interposition of the Courts. It seems plain that such an instrument was not within the meaning of the Act or in the mind of its framers, as it stood prior to the passing of sec. 23. That section, as amended by 4 Edw. VII. ch. 10, sec. 36, provides that 'in the case of a mortgage or conveyance of goods and chattels of any incorporated company, made to a bondholder or bondholders or to a trustee or trustees, for the purpose of securing the bonds or debentures of such company,' the affidavit of *bona fides* may be made as therein prescribed. Here again the difficulty presents itself that the section applies only to

a mortgage or conveyance of goods and chattels. And on its face it seems to exclude a bond or debenture simply. It deals with the case of a mortgage or conveyance made for the purpose of securing the bonds or debentures of a company; and enacts (amongst other things) that the affidavit may be made by the mortgagee or one of the mortgagees, all which seems quite inapplicable to bonds or debentures by themselves."

Mr. Justice Osler, at p. 388, says: "Section 23 of the Act shews how far the Legislature intended to go in dealing with instruments for securing the bonds or debentures of a company. The only instruments of that class which are required to be registered are mortgages or conveyances of goods and chattels made to a bondholder or trustee for the purpose of securing the bonds or debentures of the company, instruments as I understand the sections, of the same character as those mentioned in other sections of the Act, something quite different from the security by way of floating charge which the Companies Act enables a company to create by the bonds themselves."

Mr. Justice Meredith, at p. 390, says: "There was no mortgage given for securing payment of these bonds, but they, upon their face and in the conditions endorsed on them, declared that all the company's property, real and personal, rights, powers, and assets of every kind and description, present and future, including its uncalled capital, 'were charged with the payment of the bonds. That the bonds are not mortgages, or conveyances intended to operate as mortgages, of goods and chattels, within the provisions of the Bills of Sale and Chattel Mortgages Act, I cannot but think plain; they are neither in form nor in substance, such a mortgage. Under them no title to the property in, or right to possession of, the chattels passed to the bondholders; a charge upon the chattels and other the property of the company was created, giving them priority of payment out of the assets of the company."

The validity and effect of what is called a "floating charge" on the property, both present and future, of a company, has been the subject of much judicial consideration in England. The cases are collected and discussed in Palmer's Company Law (9th ed.) 307-311, where it is pointed out that it has been well settled by the authorities that a floating charge is valid as against execution and general credi-

tors, whether in a winding up or otherwise, and retains its floating character unless otherwise agreed, until a receiver is appointed or a winding up commences.

As to the injustice to subsequent execution creditors arising from the nature of a floating security as defined by the authorities, see observations of Buckley, J., in *Re London Pressed Hinge Company* (1905), 1 Chy. 576, at p. 583: also the dissenting judgment of Garrow, J.A., in *Johnston v. Wade*, p. 392, *et seq.*

The English Companies Act, 1908, sec. 93, providing for registration of floating charges and declaring them void as against creditors, unless registered, would appear to remove the danger of injustice to other creditors in England; and it may be that our statute law should also be amended in view of the holding in *Johnston v. Wade*, by declaring them void against creditors unless registered under sec. 78 of the Ontario Companies Act, 1907.

As pointed out by the Chief Justice of Ontario, in *Johnston v. Wade*, p. 386, the English cases turning as they do on the terms of legislation which is not the same as our provincial legislation, afford but little assistance, and in the last analysis we must have recourse to the language of the Acts of our own Legislature, and the judgment in that case is clearly based on the conclusion that a debenture on its face charging the property of a company with its payment, was not a "mortgage or conveyance intended to operate as a mortgage of goods and chattels" within the meaning or contemplation of our Bills of Sale and Chattel Mortgages Act.

That case is, therefore, differentiated from this case by the fact that in this case the bonds do not create the charge but a mortgage is given which creates the charge in favour of a trustee for the bondholders, and, although it embraces the company's real as well as its personal property. I think that so far as it purports to charge personal property it is clearly a "mortgage or conveyance intended to operate as a mortgage of goods and chattels" within the meaning of secs. 2 and 23 of our Bills of Sale and Chattel Mortgages Act, and not having been accompanied by an immediate delivery and an actual and continued change of possession of the things mortgaged, and not having been registered as a chattel mortgage is, as such, under sec. 5 of the Act, "absolutely null and void as against creditors of the mortgagor."

As a chattel mortgage it was also void *ab initio* as against creditors, according to the view of the late Chief Justice Strong, in *Clarkson v. McMaster* (1895), 25 S. C. R. 96, at pp. 105-6, by reason of the agreement that it should not be registered under the Bills of Sale and Chattel Mortgages Act.

Then as to the book debts, it is well settled that they are not within the Bills of Sale and Chattel Mortgages Act, and that a transfer of them does not require registration. *Kitching v. Hicks* (1884), O. R. 739; *Tailby v. The Official Receiver* (1888), 13 A. C. 423; *Thibaudeau v. Paul* (1894), 26 O. R. 385.

While the mortgage in question does not specifically mention present or future book debts, I think the language "undertakings . . . together with . . . income and sources of revenue, moneys, rights, privileges . . . held or enjoyed by it now or at any time prior to the full payment," etc., is sufficiently comprehensive to create an equitable charge on present and future book debts. *In re Perth Flax and Cordage Co.* (1908), 13 O. W. R. 1140, where the language of the chattel mortgage was "all property, real and personal, that shall hereafter be acquired and owned by the company," it was held that these words were amply sufficient to include future book debts. A charge created by such general language as that employed in this mortgage attaches, I think, to the subject charged in the varying condition it happens to be from time to time. See *Government Stock Company v. Manila* (1897), A. C., at p. 86; and *Buckley's Company Acts* (9th ed.), 230-231.

I am of opinion, therefore, that as to any book debts that were unpaid at the date of the assignment by the company, the plaintiff is entitled to recover the amount that was realized therefrom by the assignee or the defendant, and that the fact that no notice of the charge was given by the plaintiff to the debtors, does not, as argued by Mr. Laidlaw, alter that right. Upon this point, *Thibaudeau v. Paul* (*supra*); *Re Perth Flax & Cordage Co.* (*supra*); and *Eby Blain v. Montreal* (1908), 17 O. L. R. 292, are, I think, conclusive.

The question of the right of the defendant as liquidator to contest the plaintiff's claim under the mortgage, and to hold the proceeds of the chattel property for the benefit of the creditors, has given me much trouble; but I have ar-

rived at the conclusion that the defendant has that right, and that it is not necessary for the purpose of adjudicating upon the title to the fund in question to add the Imperial Plaster Company as a defendant. Under sec. 33 of the Winding-up Act, the liquidator upon his appointment "shall take into his custody or under his control, all the property, effects and choses in action to which the company is or appears to be entitled." Having done this, further general duties are as stated in Palmer's Company Law (9th ed.) 395, "to make out the requisite lists of contributories and of creditors, to have disputed cases adjudicated upon, to realize the assets, and to apply the proceeds in payment of the company's debts and liabilities in due course of administration, and having done that, to divide any surplus amongst the contributors and to adjust their rights."

While the title of the estate of the company does not, under the Act, vest in the liquidator, it must clearly be his duty, as an officer of the Court, when he has in his custody property to which the company appears to be entitled, to protect that property for the benefit of the creditors who may be interested therein. Now, when the defendant as liquidator, took possession of the property in question, which was then in the possession of the company's assignee for creditors, the liquidator had no notice of any claim of the plaintiff, nor, as far as I can see, had he any notice of such claim until after the chattel property had been converted into money, and when he so took possession, it was property to which, within the meaning of sec. 33, the company or its assignee for creditors "appeared to be entitled."

Had the liquidator given up this property or its proceeds, when demanded, without submitting to the Court the claim on behalf of creditors to the effect that the plaintiff's mortgage was void as against them, the liquidator would, I think, have committed a gross breach of duty. When the claim was made, by the plaintiff, the liquidator joined with a creditor on behalf of all other creditors of the company in contesting the claim under sections 85 to 90 of the Act. Instead of submitting to a summary disposition of the matter before the Official Referee, the plaintiff elected, upon leave of the Court, to bring this action against the liquidator only.

In re Canadian Camora Company (1901), 2 O. L. R. 677, at p. 679, Street, J., observes: "It is necessary to bear

in mind the position in which a liquidator stands in a compulsory winding up, namely, that while in no sense an assignee for value of the company, he stands for the creditors of the company and entitled to enforce their rights, because their right to prosecute actions themselves against the company and to recover their claims directly out of the property of the company is taken away by the Winding-up Act."

Being, therefore, from the beginning *prima facie* lawfully in possession of the property in question as an officer of the Court, and having, as I find, converted the same into money without notice of the plaintiff's alleged lien, and being charged with the duty of applying the proceeds in payment of the company's creditors in due course of administration, I hold that the defendant is entitled in right of the creditors represented by it as liquidator to contest in this action the validity of the plaintiff's mortgage.

Under the circumstances found in this case, the liquidator is, I think, entitled to maintain in defence of the action the superior claim of the creditors whom he represents.

Discussing the defence of *jus tertii*, it is stated in Clerke & Lindsell on Torts, 3rd ed., at p. 552, that: "If the plaintiff makes out a good *prima facie* title by possession of otherwise, the defendant must, in the first place, impeach that title by shewing that there is a better right in some one else. That better right may be in himself or in some person under whose authority he is acting or under whom he claims, and in such a case he clearly has a good defence, for a man cannot be guilty of trespass or conversion in respect of goods to the possession of which he is entitled."

Here the defendant's position is strengthened by the fact that at the time of the action, the *prima facie* title by possession was in the defendant. See further as to defence of title of third party, *Richards v. Jenkins* (1886), 17 Q. B. D. 544, affirmed in 18 Q. B. D. 451.

Judgment will be in favour of the plaintiff for payment by the defendant of all money realized from book debts outstanding and unpaid at the date of the assignment, September 14th, 1907, but dismissing the balance of the plaintiff's claim, and declaring that the mortgage was as a chattel mortgage void as against the creditors of the company. No costs of action to either party, but the defendant's costs will be paid out of the balance of the fund as between solicitor and client.

The appointment of liquidator having superseded that of the assignee, the former took possession of all the assets of the company and proceeded to convert the same into money and to collect outstanding accounts, and generally to administer the affairs of the company.

By September 8th, 1909 (date of liquidator's statement of receipts and disbursements), the defendant had apparently realised upon all the convertible assets of the company, and so far as I can judge from the statement, those assets consisted chiefly of manufactured cement, sacks for cement, coal, and book accounts, and cash received from the assignee as proceeds of goods sold and book debts collected before he handed the estate over to defendant. It does not appear that machinery or anything in the nature of fixtures was realized upon by defendant.

So far as the evidence discloses, the first claim made by the plaintiff to assets and proceeds of assets in defendant's hands, was by a notice in October, 1909, in which plaintiff claims all the proceeds of the assets of the company realized by the defendant as liquidator, and all other assets (if any), which may be unrealized in the hands of the liquidator, upon the ground that all such assets belonged to plaintiff by virtue of above recited mortgage.

Nothing appears to have been done under this notice until 28th September, 1910, when joint objections to plaintiff's claim were filed and served by the defendant and the Imperial Plaster Company, Limited, the latter, "on behalf of themselves and all other creditors of the Raven Lake Portland Cement Company, Limited" upon the ground among others that the mortgage was void for noncompliance with the Bills of Sale and Chattel Mortgages Act, and that the assets were not covered by the mortgage. Instead of adjudicating upon the claim and the objection thereto, the learned Referee on 3rd November, 1910, granted leave to issue a writ and prosecute an action against defendants "in respect of goods and chattels and book debts and choses in action formerly belonging to the Raven Lake Portland Cement Company, Limited, or the proceeds thereof claimed by the National Trust Company, Limited."

This action was accordingly brought, but it is to be observed that the other contestant, the Imperial Plaster Company, Limited, was neither made a party to the action, nor was its objections adjudicated upon by the Referee.

An application was made to the Master in Chambers by the defendant, to have that company added as a party defendant, but the motion was refused and the refusal was sustained on appeal without prejudice to an application being made to the trial Judge if it should appear to him that the proposed defendant is a necessary party to enable him to adjudicate upon the title to the money in question.

The statement of claim sets forth the mortgage, alleges default and non-payment, and charges that, notwithstanding the plaintiff's rights under the mortgage, the defendant took possession of certain goods and chattels, the property of the said company and subject to the plaintiff's mortgage, and sold the same, and also collected certain book debts and choses in action, the property of said company, and wrongfully converted the same to its own use and refuse to deliver the same or account for the proceeds thereof to the plaintiff, and plaintiff claims an account of the same or, in the alternative, damages for conversion of said goods, chattels and book accounts.

The defendant pleads the winding up proceedings, disclaims any personal right or interest in the property, denies unlawful conversion, submits that the Imperial Plaster Company, Limited, on behalf of themselves and all other creditors, should be added as a party defendant, and repeats the objections to plaintiff's claim set forth in the notice of contestation above referred to.

The following questions arise for determination:

(1) Does the mortgage bind the goods and chattels in question, notwithstanding the provisions of the Bills of Sale and Chattel Mortgages Act?

(2) Does the mortgage bind the book accounts in question, or any of them?

(3) Is the defendant, as liquidator, entitled to contest the plaintiff's claim on the ground that the provisions of the Bills of Sale and Chattel Mortgages Act were not complied with?

(4) If the defendant is not so entitled, should the Imperial Plaster Company, Limited, be added as a party defendant?

Upon the first question, counsel for plaintiff submits that the mortgage creates a floating security, and as such extends to all personal property of the company, whether existing at the date of the mortgage or subsequently ac-

510 THE CHIEF JUSTICE OF THE SUPREME COURT [VOL. 21
An issue under 9 Edw. VII. ch. 37, sec. 7, as to the mental condition of John James Peel, the defendant, directed upon the application of his brother, Charles Alfred Peel, the plaintiff, for an order declaring lunacy; and inquiry under 1 Geo. V. ch. 20, as to capacity to manage his affairs. The issue and inquiry was heard by HON. SIR JOHN BOYD, C., at Lindsay.

I. E. Weldon, for the plaintiff.

F. D. Moore, K.C., for the defendant.

HON. SIR JOHN BOYD, C.:—An issue being directed to be tried at Lindsay pursuant to the provisions of the Lunacy Act, 9 Edw. VII. ch. 37, sec. 7, etc., I found upon the evidence that the said J. J. Peel was not of unsound mind and incapable of managing himself or his affairs, and thus dispose finally of that issue except as to costs. I also then considered an application under the Act of 1911, 1 Geo. V. ch. 20, permitted (by the order directing the issue) to be made before the Judge who tried the issue as to whether the same person was "through mental infirmity, arising from disease, age, or other cause, or by reason of habitual drunkenness or the use of drugs, incapable of managing his affairs:" sec. 1. This Act is apparently an adaptation from and an extension of the provision in the English Lunacy Act of 1890, 53 & 54 Vict. ch. 5, sec. 116 (1 d), intended for the protection of persons who, "through mental infirmity arising from disease or age," are incapable of managing their affairs. Our Act is not limited to "mental infirmity arising from disease or age," but is couched in wider terms. The present case would not come under the terms of the English Act, for the peculiarities of J. J. Peel arise neither from disease, nor age, nor are they referable in any respect to drunkenness or the use of drugs; the infirmity or weakness of his mind arises from "other cause." Both Acts deal with cases on the border line between sanity and insanity; *Re Brown* (1894), 3 Ch. 416. At the trial it abundantly appeared that he was free from any mental disease and so could not be regarded as of unsound mind: *Re Barber*, 39 Ch. D. 187; and it was also well proved that he was neat

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improved since the death of his mother, when he has had to find for himself, and he will not only be better in mind, but will do better in business if left to look after his own little property uncontrolled by the Court. His own view of this application is that he regards his brother, the applicant, as a man who is after his property, and he does not want to have the Court put any man above him. I had a short and satisfactory interview with him, and he is looking forward to the investment of the \$1,000 now in Court so that it will yield him 6½ per cent., and would not be content to take 4½ per cent. from the Court. I see no reason why this money should not be paid out to the joint order of himself and his solicitor, Mr. Moore, which will be the first step towards its proper investment.

As to the costs I have conferred with my brother Riddell, who directed the issue, and I think the right disposition of these is, that there should be no costs of proceedings prior to the application which resulted in the order of the 7th June, 1911, but that all the subsequent costs, including that order, should be paid by the applicant to the defendant. The applicant having failed in satisfying the Judge beyond reasonable doubt as to the unsoundness of mind might well have retired at that point, but he urged the matter on to a further large expenditure of cash, and these last costs should be paid by the unsuccessful party.

MASTER IN CHAMBERS.

APRIL 22ND, 1912.

RE SOLICITOR.

3 O. W. N. 1132.

*Solicitor—Retainer by Prisoner—Proceedings to Quash Conviction—
Motion to Compel Delivery of Bill of Costs — Jurisdiction of
Master-in-Chambers—Referred to High Court Judge.*

The client, a foreigner, in gaol awaiting transference to the Central Prison retained the solicitor to take proceedings to quash his conviction and gave the solicitor \$300. signing a writing that it was given as a retainer. On motion to compel delivery of a bill of costs by the solicitor.

Master-in-Chambers *held*, that he had no power to entertain the application and referred it to a Judge of the High Court.

9 Edw. VII. c. 28, s. 24, *et seq.*, discussed.

Motion by the client for an order for delivery of bill of

J. D. Falconbridge, for the client's motion.

F. Arnoldi, K.C., for the solicitor, contra.

CARTWRIGHT, K.C. MASTER:—The client being in gaol and awaiting transportation to the Central Prison instructed the solicitor to take proceedings to have the conviction quashed. At the time of such engagement an agreement was drawn by the solicitor as follows:—"October 20th, 1911, I hereby retain (the solicitor) to make application for my release from gaol and herewith deliver to him cheque for (\$300) three hundred dollars as retainer." This is produced signed by the prisoner and witnessed in pencil by the gaoler. He makes affidavit of execution in his presence and also says that the contents of the agreement "were carefully explained to the (client) before he signed the same." In a second affidavit he says the cheque for \$300 was filled in before signature by the prisoner. The client is very positive that he gave the solicitor a blank cheque and that he never understood that he was to pay as much as \$300 for his solicitor's services.

The client is a foreigner and says he has a very imperfect knowledge of the English language. From his signature to the affidavit and agreement he seems to be of an ordinary education.

The application for release failed; and the client was informed of that by the solicitor on 23rd January, 1912, by letter which also said: "The cheque of \$300 that you gave to me in accordance with our agreement "covers your part of the transaction."

On 6th February the client replied repudiating any such agreement or signature of cheque for \$300 and asking for a bill of costs.

On the 8th February the solicitor wrote refusing the client's request.

After another month the present solicitors took the matter up without result, and the present motion was thereupon launched. Looking at what was said in the similar case *Re Solicitor*, 21 O. L. R. 255, affirmed by Divisional Court in 22 O. L. R. 30, it would seem that if the view of the solicitor is accepted by the Court he can retain what he has been paid on stating his willingness to accept that in full of any claim for costs.

REX v. HARRAN.

3 O. W. N. 1107.

Justice of Peace—Jurisdiction—Conviction under Ontario Game and Fisheries Act — Bona Fide Assertion of Right — Title to Land — Jus Tertii—Land Covered by Water — Covered by Crown Patent—Absolute Ownership.

Motion by defendant to quash a conviction for an offence under the Ontario Game and Fisheries Act, 7 Edw. VII. c. 49, s. 25 on ground that the jurisdiction of the Justice had been ousted by reason of the act complained of having been done in pursuance of a *bona fide* claim of right.

MIDDLETON, J., *held*, that in order to oust the jurisdiction, the action of the accused must be in assertion of a reasonable and colourable right in himself, and that mere honesty in the assertion of the claim or the setting up of some *jus tertii* is insufficient.

Cornwall v. Sanders, 3 B. & S. 206, followed.

That where a Crown patent embraces land covered with navigable water, the patentee's ownership of the land patented is absolute save only for the right of navigation.

Macdonald v. Lake Simcoe Ice Co., 31 S. C. R., followed.

Motion dismissed with costs.

Motion by the defendant to quash a conviction for an offence under the Ontario Game and Fisheries Act, 7 Edw. VII. ch. 49, sec. 25.

G. P. Deacon, for the defendant Harran.

D. L. McCarthy, K.C., for the prosecutor.

HON. MR. JUSTICE MIDDLETON:—There is no doubt, upon the evidence, that the accused entered upon the lands in question for the purpose of hunting and fishing thereon; and the Justices have found, upon ample evidence to justify the finding, that the lands were enclosed in the manner pointed out by sec. 25, sub-sec. 5, and that sign boards forbidding hunting and shooting were placed as required by sub-sec. 2, (b) and (c).

Upon the motion, it was argued that the jurisdiction of the Justice was ousted by reason of what was done by the accused being a *bona fide* assertion of right to hunt and fish, and the title to lands having been brought into question.

The Ontario Statute, under which this prosecution is taken, contains no such provision as that found in the Petty Trespass Act, R. S. O. ch. 120, sec. 1, which excepts from its penal provisions "any case where the party trespassing acted under a fair and reasonable supposition that he had a right to do the act complained of" as well as any case falling

The Criminal Code, sec. 540, provides that its penal provisions with respect to injury to property shall not apply to "any case where the person acted under a fair and reasonable supposition that he had a right to do the act complained of," and "any trespass, not being wilful and malicious, committed in hunting and fishing or the pursuit of game."

In many of the cases cited, the determination was under statutes containing some similar provision. But, quite apart from any statutory provision, the Courts have uniformly held that the jurisdiction of the magistrate is ousted, where there is shewn to be a bona fide claim or dispute, and where the action of the accused is in assertion of a colourable claim. but in these cases, as said by Cockburn, C.J., in *Cornwall v. Sanders*, 3 B. & S. 206, "there must be some shew of reason in the claim, and it is not sufficient unless the defendant satisfies the Justices that there is some reasonable ground for his assertion of title;" and, a *fortiori*, upon a motion for a prohibition it is incumbent upon the applicant to satisfy the Court that he has at least a colourable claim of right, and that there is some real question. The jurisdiction of the Justices cannot be defeated by the mere assertion of some fanciful or imaginary claim. See also *R. v. Davy*, 27 A. R. 508.

Counsel for the accused, in his elaborate argument, based his case upon two main contentions: First, that there was some defect in the prosecutor's title to the lands, and secondly that there was a colourable claim of right to fish and to shoot upon the navigable water which covers a portion of the lands patented.

The Cartwright Game preserve is an incorporation under the laws of Ontario, and has the paper title to the lands, and is in possession. The suggested defect arises from the fact that there was some dispute at one time as to the township in which the lands were actually situated; a dispute which was ultimately placed at rest by the Legislature. It is said that this invalidated the sale for taxes, because the effect of this legislation was to declare that the land was not situated in Cartwright, which imposed the assessment, but in the township of Reach.

The other suggested defect arose from an entire misunderstanding of the facts. The accused thought that a

been registered. A claim and contention is completely covered by the case already referred to, *Cornwall v. Sanders*, which determines that the claim of title to oust the jurisdiction of the Justices must be a claim of title in the party charged and that the suggestion of a *jus tertii*, or of a mere defect in the complainant's title, is quite beside the mark.

The other objection seems to be equally unavailing. The Crown has patented the land. Part of the land is covered with water. This undoubtedly makes the land subject to the right of navigation; but, subject to this right, the ownership of the land is absolute. See *Macdonald v. Lake Simcoe Ice Co.*, 31 S. C. R. 130. The fact that others have the right to navigate does not confer any title upon the accused to shoot in this game preserve.

The accused, also, before the magistrate sought to shew a right to hunt and fish by reason of the fact that others had hunted and fished there for many years, and that he had also done so for a long time. This brings the case very close to the case already cited, where it was held "that the jurisdiction of the Justices was not ousted by the claim of a prescriptive right in gross to kill game upon the land, there being no colour for such a claim." The same view appears to have been taken in *Reece v. Miller*, 8 Q. B. D. 626. The Irish decision, *Johnston v. Meldon* (1891), 30 L. R. Ir. 15, is entirely consistent with this view. It is there held that the jurisdiction of the magistrates is ousted if there is a bona fide claim, but it is the duty of the magistrates to determine whether the claim is bona fide, and upon finding upon this question, they should then decline to proceed farther. It may well be that they will not give themselves jurisdiction by an erroneous decision; but in this case the applicant has not satisfied me that he has a bona fide claim within the cases.

I quite believe that the accused is honest in making his claim. That, as I understand the rule, is not enough. There must be some shew of reason.

This case is not at all like *Rex v. Lansing*, 14 O. W. R. 1007; as here it is shewn that the land was enclosed, and that sign boards, as required by the statute, were placed, and that there is no doubt of the offence having been committed. While Hon. Mr. Justice Britton states that the title to land was brought into question, this was not essential to his judgment, nor does he deal at all with the aspect of the matter above indicated.

The application fails, and must be dismissed with costs.

An appeal by J. H. Dickenson, representative of the late Naomi Dickenson, from an order of HON. MR. JUSTICE RIDDELL, 21 O. W. R. 352; 25 O. L. R. 505; 3 O. W. N. 678, upon one of the questions submitted as to the construction of the will of the late John M. Denton.

The appeal to Divisional Court was heard by HON. SIR JOHN BOYD, C., HON. MR. JUSTICE LATCHFORD and HON. MR. JUSTICE MIDDLETON.

T. G. Meredith, K.C., for the appellant.

M. D. Fraser, K.C., for the beneficiaries under the will other than Naomi Dickenson.

Joseph Montgomery, for the executor.

HON. SIR JOHN BOYD, C.:—The 7th and 8th clauses of the will are these:—

(7) After the death of my wife to sell property and pay to sister Naomi and to Mary \$500, and to divide the remainder equally amongst all my brothers and sisters, including Naomi and Mary.

(8) Should any of my brothers or sisters die before the final division of my estate leaving lawful issue then and in such case I desire that the share which such deceased brother or sister would have been entitled (to) if living shall be divided equally amongst the children of such deceased brother or sister so that such child or children shall take the portion which his or her or their parent would have been entitled (to) if living.

Upon questions submitted to the Court touching the proper construction of John Denton's will, the fifth one was this: Are the children of Naomi entitled to share under the provisions of clause 8 in the remainder of the fund formed under clause 7 of the will?

The Judge's answer is that these children are excluded. From this the present appeal is lodged.

The important dates are these. The will of the testator was dated and made 24th June, 1889. The sister of testator Naomi died in 1892, leaving children. The testator died in 1896. His widow died in 1910. At that time in 1910, his estate became finally divisible upon the death of the life tenant. Naomi died before this final division; she also died before the testator; but the important point which appears to have been passed by unconsidered is that she was alive

Romilly, *Christopherson v. Naylor*, I have already referred to as being on the same state of facts. *Congreve v. Palmer*, 16 Beav. 435, was in like manner a case where the sister was dead at the date of the will, and had, therefore, no capacity to take and did not take by the terms of the will.

Re Potter's Trust, L. R. 8 Eq. 52, is not quoted in the judgment under appeal, and Malins, V.-C., there affirms the law to be on reason thus: "Whenever there is a gift to a class with gift by substitution to children of those who shall die, the children take what their parents would have taken if living at the testator's death, without regard to the question whether the parents died before or after the date of the will." That is an unquestioned statement of law so far as relates to parents dying after the date of the will, but it has provoked controversy as to those who were dead at the date of the will. On this head it seeks to controvert *Christopherson v. Naylor*, but on this branch of the inquiry we have no concern in order to dispose of the present appeal. The controversy is raised in *Re Hotchkiss Trusts*, L. R. 8 Eq. 650; but the case itself is an express decision that where the gift is to a class of persons living at the date of the will, the children of those who died between the date of the will and the testator are entitled.

Thornhill v. Thornhill, 4 Madd. 377, is apparently an off-hand decision of the Vice-Chancellor, who had the reputation of determining without hearing, and is but meagrely reported. The case seems to have turned on the language of the will giving the children the share of the parent; and, as the parent died in the testator's lifetime, he never had a share to transmit to the children; and on this ground it may be supported, and it is so treated by Mr. Theobald; see Theobald on Wills, 7th ed., p. 671. And he distinguishes it from cases where (as in the present will), what is given to the issue is the share or portion which a member of the class would have taken if he had lived, in which the substitution operates as regards a person who dies in the testator's life, but who was alive at the date of the will. *Thornhill v. Thornhill* is approved and followed by North, J., in *Re Hannam, Haddley v. Hannam* (1897), 2 Ch. 39; but it has not otherwise been received with favour; and both cases are any way clearly distinguishable from this case, where the testator's language expressly provides for the case

prior to the final distribution.

The point is thus put by Kay, J., in *Re Webster's Estate*, 23 Ch. D. 739, where there is a gift to a class and then a substitutory gift of the share of any one of the class who should die in the lifetime of the testator, no one can take under the substitutionary gift who is not able to predicate that his parent might have been one of the original class, and consequently if the parent was dead at the date of the will, and, therefore, by no possibility could have taken as one of the original class, his issue are not able to take under the substitutionary gift.

But I favour the construction of this will as one in which the gift is not strictly of substitutory character, but as presenting two classes of original legatees; one, the primary legatees who are the brothers and sisters of the testator, who are alive at the time of final distribution after the death of the testator's wife; the other, the secondary legatees consisting of the issue or the children of any of the primary legatees who may die leaving issue before the period of final distribution. I would adopt and apply the language of Kindersley, V.-C., as used in *Lamphier v. Burk*, 34 L. J. Ch. 356; "the gift is to two classes of objects, to such nephews and nieces as shall be living at a given time and to the issue of such nephews and nieces as shall be dead at the time. Is that an original gift to the issue or a gift by substitution? Clearly an original gift to them. It is true you may say in a sense that they are substituted for their parents, because they take the share respectively among them which their parent would (if he had come under the first class) have himself taken and in that sense (but that is not the accurate and proper sense), you may say that there is substitution; but it is as much an original gift to the issue of such of the nephews and nieces as shall have died before the tenant for life (or the period of distribution), as it is an original gift to such of the nephews and nieces as shall be living at the death of the tenant for life" (or other fixed period).

I find no authority preventing us from giving effect to the clear and obvious meaning of the testator that the children of his sister should take the share intended for their

I may say so harmonized by the exposition of the subject by the Lords in *Barraclough v. Cooper*, as reported in a note to the case of *Re Lambert* (1908), 2 Ch. 117. They repudiate any canon of construction beyond the fact that enough is found in the language of the instrument to shew what was the meaning of the testator. And Lord Macnaghten quoted with emphatic approval the words of Vice-Chancellor Kingsley in *Loring v. Thomas*, 1 Dr. and Sm. 510, as follows: "Now, of course, the question is one of intention, and it is obvious in cases of this kind a testator may mean to include as objects of his bounty or he may mean to exclude the issue of the predeceased children. When a testator directs that issue shall represent or stand in the place of or be substituted for a deceased child, and take the share which the parent would have taken if living, he may intend such representation or substitution to apply only to the case of the child dying subsequently to the date of his will and before the time of his own death, or he may mean it to extend also to the case of the child who was already dead at the date of the will. The solution of the question which of the two he intended must, of course depend on the language he has used in indicating such representation or substitution. He may use language of such restricted import as to be inapplicable to any children, but such as are living at the date of the will. But if he uses language so wide and general as to be no less applicable to a predeceased child than to a child living at the date of the will, then the direction as to such substitution or representation must be held to embrace both."

The House of Lords have in effect given their sanction to the vigorous words of James, V.-C., in *Habergham v. Richards*, L. R. 9 Eq. 339 (1870). He says: "It was contended by Mr. Kay that a gift to A. and a class of persons is also a gift to a class, and that with regard to that class the rule has been laid down; that in order to determine the class you must take the persons who answer to the description at the date of the death of the testator. That implies that when there is a gift to a class that means a gift to such of the class as shall be living at the death of the testator; and it follows that no other member of the class who may have died in the lifetime of the testator will be entitled. That meaning is a very good illustration of the process by which in this Court we have established a body of dogma and developed a whole code of artificial rules according to which a testator's will is

capable of being construed except by those learned persons who have the key of the cypher. Nevertheless the Court is enabled to determine questions arising upon wills according to the rules of common sense; either by paying off one rule against another or by resorting to some general rule of construction which controls the rest." And the Vice-Chancellor proceeds to act accordingly.

A case of *Re Fleming* (1904), 7 O. L. R. 651, decided by Mr. Justice Street, supports the view taken on this appeal.

I agree with my brother Riddell as to the meaning of the testator, and I do not read the authorities cited as going to interfere with the operation of common sense in the construction of the testator's language.

I rather favour giving costs of this appeal out of the estate.

HON. MR. JUSTICE LATCHFORD:—I agree.

HON. MR. JUSTICE MIDDLETON:—I entirely agree. Lindley, L.J., in *Re Palmer*, [1893] 3 Ch. 369, dealing with a case where the Judge of first instance had thought that he was precluded by prior decisions from giving effect to the testator's intention, uses words peculiarly apt here:

"The result in all these cases has been, in my opinion, to miss the intention as expressed, and unfortunately to defeat it without sufficient grounds. This line of cases affords a striking illustration of the mischief done by construing one will by paying too much attention to decisions on other wills. Rules of law must be attended to; but if in any case the intention of a testator is expressed with sufficient clearness to enable the Court to ascertain it, the Court ought to give effect to it in that case, unless there is some law which compels the Court to ignore it; and the mere fact that in other wills more or less like it other Judges have not been satisfied as to the intentions expressed in them is not sufficient ground for defeating an intention where the Court holds it to be sufficiently expressed in the particular will which it is called upon to construe."

Quite apart from cases, the language of the testator here admits of no possible doubt. The testator has directed the

equally amongst all his brothers and Dickenson, who is expressly named provides that should any of his brothers the final division of his estate, leaving which the deceased brother or sister to if living, shall go to the children or sister.

The will as to persons speaks from during the testator's lifetime. In reading into this will a provision withholding children from sharing because she is This would be clearly contrary to the will. The analysis of the cases by that there is no authority compelling testator's language and frustrate his

HON. SIR WM MEREDITH, C.J.C.P.

TOWNSEND v. NORTHERN

3 O. W. N. 1105; O.

Banks and Banking — Security under Bank Lumber Dealer — "Product of Forest 88 (1)—Assignment for Benefit of Building Contract—Book Debts.

Action by assignee for benefit of creditors to set aside certain assignments to defend of collateral security of securities taken up of certain moneys payable under building book debts.

MEREDITH, C.J.C.P., held, that upon R. S. C. (1906), c. 29, s. 88 (1) the "provisions thereof" apply to all the articles mentioned

Molsons Bank v. Beaudry, 21 Que. S. C. 100, *semble*, that sawn lumber is a proper meaning of above sub-section.

Judgment for defendants save as to proportion of moneys payable under building represent lumber covered by assignment directed if asked.

No costs.

Action by the assignee for the Joseph E. Brethour to set aside the securities given by Brethour to defer indebtedness to them. Tried without the 14th June, 1911.

W. Laidlaw, K.C., for the plaintiff

F. Arnoldi, K.C., for the defendant

terial to the present injury and the substituted sub-section appears in the Revised Statute, ch. 29, as sub-sec. 1 of sec. 88.

In my view, the construction placed by Hall, J., on sec. 74, was the correct one. In my opinion, the words "and the products hereof," in the fourth and fifth lines, apply to all the articles previously mentioned in the sub-section, and, therefore, apply to the products of the forest, and the words "the products thereof," in the last line, apply as well to the products mentioned in the earlier part of the sub-section as to the products of live stock and dead stock.

Being of this opinion, it is unnecessary to express an opinion as to whether sawn lumber is a product of the forest, within the meaning of the sub-section, but I am inclined to think that it is.

It is further contended, that as the security under which the defendants claim was given less than 60 days before the making of the assignment, it cannot prevail against the assignment. That security was, however, but a continuation of a former security of the like character held by the defendants for the indebtedness, and this contention, therefore, fails.

Some of the lumber upon which the defendants held security, was manufactured into doors and window sashes and the like, and these products of the lumber are covered by the securities. R. S. C. ch. 29, secs. 88-89.

None of the other articles covered by the securities are within section 88 of the Revised Act, and the securities do not, therefore, extend to them.

Some of the lumber covered by the securities was used by Brethour in the erection of buildings, and, as far as the money payable under the building contracts assigned to the defendants represents the lumber so used, they are entitled to it.

The claim of the defendants to the book debts cannot be supported, and, indeed, according to my recollection of what took place at the trial, it was abandoned.

If the parties cannot agree as to it, there will be a reference to the Master in Ordinary to determine what part of Brethour's stock in trade, at the time of the assignment, not being lumber, was the product of lumber covered by the defendants' securities, and what part, if any, of the money payable under the building contracts assigned represented lumber or the products of lumber covered by those securities.

As success is divided, there will be no costs to either


to share the commission if Stinson could find a purchaser. Stinson introduced to Wilson one Klingensmith as a probable purchaser of one or the other of the properties in question. Klingensmith at this time was a member of a syndicate who desired to buy property in that locality. He opened negotiations with Wilson for the Atkinson property and the deal would probably have gone through but for the death of Mrs. Atkinson. While the negotiations for the Atkinson property were pending, but suspended owing to the illness of Mrs. Atkinson, Klingensmith enquired of Wilson about the other property and Wilson shewed him over it. The other members of Klingensmith's syndicate, not caring for the Wilson property, withdrew and thereupon Klingensmith states that he could not take the matter up alone and told Wilson that if he could get an offer he would submit it to Wilson. Wilson received from the plaintiff Graham the blue print which he had given him and gave it to Klingensmith.

Klingensmith obtained a purchaser, and at the time the agreement for purchase was being closed Wilson asked Klingensmith if he would be satisfied with $2\frac{1}{2}\%$ commission. He stated that he would and in his letter transmitting the offer to Wilson he states that the offer is conditional upon his being paid $2\frac{1}{2}\%$ commission.

As throwing light upon the transaction and the motives of the parties, it may be stated that Wilson was desirous of putting through the Atkinson deal because he would receive out of that $2\frac{1}{2}\%$ commission upon a sale representing probably \$100,000. Whereas in the sale of the Wilson property he was not interested and did not seek a commission owing to the fact that the owners were friends of his and had permitted him to occupy the premises as a summer residence.

On cross-examination Wilson states that when Klingensmith was introduced to him by Stinson neither of the properties were especially mentioned. This is also corroborated by Stinson.

I was favourably impressed with the evidence of Wilson as far as his recollection served him. On certain points he would not contradict the plaintiffs. As to his express agreement to safeguard the plaintiffs in respect of their commission upon a sale of either of the properties, I think the conversation referred to, had at that time, special reference to the Atkinson property. It may well be that the



plaintiffs had in mind both or either of the properties, but Wilson had in mind, I think, the property in respect of which the deal was at that time likely to go through and that, as I understand the evidence, was the Atkinson deal. The result is that the case is reduced to this simple statement: The plaintiffs were authorised to obtain a purchaser for the property in question. They introduced a probable purchaser who retired from that position while the negotiations were pending for the Atkinson property and himself introduced a purchaser. Wilson, however, frankly states in his evidence that he would "never have met Klingsmith had it not been for the plaintiffs." The question is whether under this statement of facts the plaintiffs are entitled to recover.

The fact that Wilson did not own the property and was not interested in any way in the property further than acting as agent for and on behalf of the owner does not relieve him from personal liability, if, in fact, he engaged the plaintiffs to find a purchaser.

In dealing with the plaintiffs he acted as owner, as the person liable, and he cannot afterwards relieve himself from such responsibility.

Lord Denman said in *Jones v. Littledale*, 6 A. & E. 490: "If the agent contracts in such a form as to make himself personally responsible, he cannot afterwards, whether his principal were or were not known at the time of the contract, relieve himself from that responsibility."

It further remains to enquire whether having been introduced by the plaintiffs to a person who procured him a purchaser, he is liable to them for the commission though such person did not in fact become the purchaser.

The plaintiffs' counsel relied strongly on *Stratton v. Vachon*. 44 S. C. R. 395. That case differs somewhat from the present one. There, one Moore was the person introduced as probable purchaser. He associated with himself certain other persons. After the negotiations had proceeded and some changes made in the terms, Moore for one cause or another withdrew and his associates carried out the purchase, and it was held that the agents who had introduced Moore were notwithstanding entitled to a commission upon the ground as put by Duff, J., that the relation of buyer and seller was really brought about by the act of the plaintiff.

could be obtained was the direct and normal consequence of the introduction of the property to Moore. It is impossible to maintain the position that Moore's act in associating Miller and Robinson with him in the adventure must be regarded as *novus actus interveniens* How then is the matter affected by the withdrawal of Moore? That is clearly not a new and independent instrumentality. Nobody suggests that the fact of his withdrawal had any effect in forwarding the transaction." Anglin, J., says: "Had the property been bought by Moore to whom the defendant directly introduced it, or by any syndicate in which Moore was personally interested, the defendant's right to his commission would appear to be incontrovertible. *Burchell v. Gowrie Blockhouse Collieries Ltd.* C. R., [1910] A. C. 250. The difficulty in the defendant's way is that, although Moore was originally interested with Millar and Robinson, he did not eventually become a co-purchaser with them. That the property was brought to their attention by Moore is not questioned: that Moore became interested in it through the introduction of the defendant is equally clear: the question is whether, in bringing the property to the attention of Millar and Robinson, Moore, though in one sense actuated by a wish to subserve his own personal interests, should, nevertheless, not be held to have done so under circumstances which entitled the defendant to a commission from the vendor." He refers to a finding of the trial Judge, "That Moore had told the defendant he would either take the property himself or obtain a purchaser for him," and says that "the evidence establishes that the defendant informed Flanagan of his interview with Moore and of Moore's proposal to interest friends of his from Lloydminster in the purchase." He agrees with the trial Judge "that the circumstances warrant an inference, if that be necessary, that Flanagan had constructive if not actual notice that his purchasers were the Lloydminster friends whom the defendant told him that Moore hoped to interest in the purchase." He then states that had Moore, Millar and Robinson become the purchasers it would be too clear for controversy that his introduction of the property to Moore would have been the "efficient cause" of the vendor obtaining his purchasers. He proceeds, "I cannot see that this introduction ceased to be the efficient cause of Flanagan

unreasonable under all the circumstances that they should be relieved from the defendant's costs. The action is dismissed without costs.

DIVISIONAL COURT.

APRIL 25TH, 1912.

BELL ENGINE & THRESHING CO. v. WESENBERG.

3 O. W. N. 1169.

Sale of Goods—Action to Recover on Promissory Notes—Given in Payment for Several Articles of Machinery—No Jurisdiction in County Court—Counterclaim—Set-off—Costs.

Appeal by plaintiffs from judgment of Perth County Court dismissing with costs but on ground of want of jurisdiction plaintiff's action on two promissory notes for \$125 and \$362 given in respect of certain machinery purchased from plaintiffs by defendant and making no order in respect of defendant's counterclaim for rescission of the contract, delivering up of the notes and return of second-hand machinery given in part payment on ground of breach of warranty.

DIVISIONAL COURT *held*, that clause in contract of purchase that contract was divisible and that each article was sold at a separate fixed price should be given effect to, and that plaintiffs were entitled to recover same as to a separator, one of the articles sold, which was the only article defendant claimed defective and as to which defendant should be allowed \$425 on his counterclaim, being the price fixed by the contract, on return of the same to plaintiff.

Judgment for the plaintiffs in action, and for defendant for \$425 on counterclaim to be set-off against plaintiffs' judgment. Plaintiffs to have general costs of action; defendants to have costs of counterclaim, including entire costs of controversy respecting non-compliance of separator with warranty to be set-off against plaintiffs' costs. No costs of appeal.

An appeal by the plaintiffs from a judgment of His HONOUR JUDGE BARRON of Perth County Court, upon the second trial of this action with a jury.

The appeal to Divisional Court was heard by HON. SIR JOHN BOYD, C., HON. MR. JUSTICE LATCHFORD and HON. MR. JUSTICE MIDDLETON.

R. S. Robertson, for the plaintiffs.

Glyn Osler, for the defendant.

HON. MR. JUSTICE MIDDLETON:—This action comes before us, even after a second trial, in a most unsatisfactory shape. The plaintiffs' claim is upon two promissory notes:

have a new trial ordered.

The result is that the plaintiffs should recover the amount due upon the two promissory notes sued upon, and, upon the defendant returning the separator he should be allowed \$425 upon his counterclaim, which may be set off against the plaintiffs' recovery; the plaintiffs recovering for the balance. This will leave the defendant with the traction engine and the remaining machinery, and will leave him liable to pay the four remaining notes as and when they mature.

The situation will probably be most unsatisfactory to the defendant because he will be left in the possession not only of the traction engine but of the other separate articles, which are probably more or less adapted for use with the plaintiffs' separator; but he has chosen to sign a contract in which the articles are separated, and which treats each article as sold for the price placed opposite to it. With this in view we urged the parties to endeavour to come to some arrangement; but we are now advised that it is impossible to hope for any settlement; and we have therefore to do the best we can with this intricate and somewhat one-sided contract.

With reference to costs, the plaintiff has succeeded in his action upon the notes; the defendant has succeeded in his claim upon the defective character of the machine. We think that the plaintiff should have the general costs of the action, and that the defendant should have the costs of his counterclaim, including therein the entire costs of the controversy respecting the non-compliance of the separator with the terms of the warranty; these costs and the plaintiffs' recovery to be set off pro tanto. No costs of appeal.

HON. SIR JOHN BOYD, C., and HON. MR. JUSTICE LATCHFORD:—We agree in the result.

FRASER v. WOODS.

3 O. W. N. 1194.

Deed — Boundary — Reformation of Conveyance — Mistake — Not Final Intention of Parties—Relief Granted.

Action for injunction restraining defendant from trespassing on plaintiff's property for a declaration of the true boundary line between plaintiff's and defendant's property, and for a rectification of the conveyance from plaintiff to defendant so as to make it express such true boundary line.

KELLY, J., *held*, that plaintiff's evidence was as was said by Lord Clemsford in *Fowler v. Fowler*, 4 De G. & J., at p. 264, "such as to leave no fear nor reasonable doubt upon the mind that the deed does not embody the final intention of the parties," and that plaintiff was entitled to the relief sought.

Judgment accordingly with costs.

Action tried at 'Sandwich, without a jury, on March 15th, 1912.

A. R. Bartlett, for the plaintiff.

J. H. Rodd, for the defendants.

HON. MR. JUSTICE KELLY:—Plaintiff is the owner and occupant of certain property in the town of Amherstburg situated on the west side of Dalhousie street and on the south side of Gore street, and running westerly to the Detroit river, and which is known as his homestead property. He was also, on the 9th January, 1911, the owner of other property on the west side of Dalhousie street immediately adjoining to the south the homestead property, and which was known as his lumber-yard property, on the river front of which is a dock.

On the ground the boundary between these two properties, and running some distance westerly from Dalhousie street, is defined by the south wall of plaintiff's barn on the homestead property, to the south of which and continuing to the river is the mark of an old ditch or drain, four or five feet wide, which in early years had been the course of a stream. On the north side of the ditch is a fence. To the south of the westerly part of the ditch is an old fence, and south of this fence a coal shed on the lumber-yard property.

The barn is situated at the south-easterly corner of the

On the river-front of the homestead property is plaintiff's boathouse.

The plaintiff acquired the homestead property under the will of his father, Simon Fraser, dated 31st January, 1903, and his title thereto was further confirmed by a conveyance made by the executors of the will on October 10th, 1907: This homestead property was occupied by Simon Fraser from the time he acquired it in 1890, and after him by the plaintiff continuously to the time of the commencement of this action.

In Simon Fraser's will these properties are referred to as "the lumberyard lot and dock in front thereof" and "the homestead south of Gore street."

Simon Fraser acquired the property known as the lumber-yard property in 1890, and conveyed it to the plaintiff in 1904, and from 1890 until after January, 1911, Simon Fraser, and after him plaintiff, occupied and used it.

On January 9th, 1911, Fred H. A. Davis, a solicitor practising in the town of Amherstburg, at the request and on the instructions of Alfred J. Woods, husband of the defendant Mabel S. B. Woods, interviewed plaintiff and asked him if his lumber-yard and dock were for sale, and if so, what price he would accept therefor. Davis did not disclose to plaintiff the name of the person whom he represented, and it was not until January 14th, when the sale was about to be closed, that plaintiff knew that Davis represented Alfred J. Woods and the defendants.

Davis says that he himself did not know until January 14th, that the defendants were interested in the transaction. He also says that when instructing him Alfred J. Woods told him he wanted to get plaintiff's lumber-yard and dock.

Plaintiff's account of what took place between Davis and him is as follows:—

"Q. Then what were the negotiations for the purchase of this property, the property that you sold to Woods? A. Mr. Davis came to my office and wanted to know if I would sell my lumber-yard and dock. I told him I would.

Q. Did you fix a price? A. He asked me the price and I fixed a price of \$3,500.

Q. Did you know who he was representing? A. No, I did not.

Q. What was the next thing that occurred with reference to it? A. The next time he came back and wanted to know where the lines were, if it was the fence back of the coal shed.

His Lordship: What is that? A. If it was the fence back of the coal shed. The next time he came he wanted to know where the line was—if it was the fence back of the coal shed. I told him, no, the line came to the side of the barn, and straight on through to the channel bank, and there was about 225 feet of water, 225 feet of water lot.

His Lordship: He came to you and asked where the line was, and what did you tell him? A. He asked me if the line was the fence back of the coal shed?

Mr. Bartlett: Are the coal sheds shewn on the plan? A. Yes.

Q. And what did you reply to that? A. I replied to him no, it came to the side of the barn.

Q. Did anything else occur that day? A. And it went on through to the channel bank."

Davis's account of what occurred agrees with plaintiff's, and he further says that he reported to Woods what took place between him and plaintiff.

At a subsequent interview with Davis plaintiff refused to give a written option, but verbally promised to hold the offer open for acceptance for a week or ten days.

After this promise and before January 14th, Alfred J. Woods saw the plaintiff and asked him if he would sell "the lumber-yard and dock." Plaintiff replied that he had already given an option on it.

On January 10th or 11th Davis went again to plaintiff and borrowed the conveyance of October 10th, 1907, from the executors of Simon Fraser's will to plaintiff, but on plaintiff's distinct instructions not to let it out of his hands.

On January 14th, Davis and Alfred J. Woods went to plaintiff's office, just across the street from the property in question, and informed him they were ready to carry out the purchase, and Davis produced ready for signature a deed from plaintiff and his wife to defendant Mabel S. B. Woods of what purported to be the lumber-yard property, the description in it having been taken by Davis from the deed of October 10th, 1907, loaned to him by plaintiff. Plaintiff

When the conveyance was read over prior signed, attention was drawn to the difference in ment as mentioned in the conveyance, and what said appeared from measurements made on the ic river-front. The description also included t "bounded on the north by the said old town line which is not otherwise mentioned in the descripti the words "the limit between the old town of Am and sail lot number 3, in said township of Mald have reference to it.

Plaintiff's evidence on this point is as follows

"Q. And Mr. Davis was filling in and writing deeds and when he came to 245 feet he said to M that I said that there was only about 225 feet; M turned around and he asked me, calling me by n much there was? I told him about 225 feet mea the ice, with a pole and sighting it up by the sout the barn.

Q. Anything else? A. Then he came on dowr they call the town line in the deeds, and he says ' the town line?' I says 'I know nothing about the but the south side of the barn was the line'— through the window."

Cross-examined by Mr. Rodd:—

"Q. Why should he want to know the line? would know where he was buying to, I suppose.

Q. What did you say to him? A. He wanted if the line was that fence back of the coal shed, a him, no, that the line came to the barn.

Q. The line of what? A. That the line came to

Q. To the barn? A. And straight on throug channel bank.

Q. You are quite sure you told him that? A.

Q. You are quite sure of that? A. Yes, and of water.

Q. And are you quite sure you said 225? A. I feet. I said 225 feet or about 225 feet.

Q. Will you tell His Lordship why you did not their changing it from 245 to 225? A. I never second thought, but what he had put in the 225, a for and I told him.

Q. You knew that in the deed itself 245 was me let us finish with that—because you have alread that? A. When Mr. Davis read that out he read

Q. Yea. A. And he mentioned 225.

Q. No. 245 he read? A. Yes, then he mentioned 225, and that was mentioned twice, and I supposed he had inserted the 225."

Davis in referring to this matter gives the following account of it:—

"Q. And what did you do when you got there? A. When we got there, Mr. Woods and I went into Mr. Fraser's office and we said to him, we came to close the deal of the property, and I read the deed over, started to read the deed as I had it prepared, and when we came to the grantees, Mr. Woods, as I recollect it, he said, make Mrs. Beresford a joint owner; and I proceeded to read the description until we got to where it is 245 feet, and I stopped at that, and told Mr. Woods that Mr. Fraser said that there was not that much, he could not find that much measuring on the ice. And Mr. Fraser then, at least, Mr. Woods asked Mr. Fraser how much there was and he told him between 220 and 225 feet."

Re-called, cross-examined by Mr. Rodd:—

"Q. There is no doubt you did read over the description in their house, whether on Wednesday— A. I did not read over any description to Mr. Woods or Mrs. Woods or Mrs. Beresford until after the deeds were signed, and that was after I left Mr. Fraser's place."

At the request of Alfred J. Woods the conveyance before being signed was changed by adding the name of Sophronia Beresford as a grantee with defendant Mabel S. B. Woods, and plaintiff might reasonably have thought that Davis, when amending the deed by writing in the name of Mrs. Beresford as a grantee, wrote in also the change of measurement. This alteration, however, was not made. Mrs. Beresford is the mother of her co-defendant, and at the time she was occupying the same house with her co-defendant and Alfred J. Woods in the town of Amherstburg.

Sophronia Beresford was advancing part of the purchase-money, and was, therefore, made one of the grantees, and the deed in that form was signed by plaintiff.

On the same day, but after the delivery of the deed, Sophronia Beresford objected to being made a grantee, as she preferred that her daughter should alone be the grantee and give her a mortgage on the property for the amount


out the name of Sophronia F change was made without the but it was afterwards brought

It was arranged that pos would be given on June 15th defendants or one of them had tiff's homestead property appa ing what the purchaser then boundary of the property so scription in the deed, and the about 30 feet to the north of t two properties as shewn on th one of them, proceeded to hav so marked out. This line took almost all of the plaintiff's bar boathouse, which formed part and defendants contend that t and ownership of the land up is the line referred to in the line."

The defendants, in the n and the defendant Beresford i made to her by her co-defenda throughout by Davis and Alfr

There is ample evidence tha Alfred J. Woods admitted tha was the northerly boundary of evidence of Bailey, the assessors sale Woods asked that the nar erty purchased be changed fro he made no reference to a ch that at the time Woods "step south-east corner of plaintiff's

There is also the evidence sale, Woods told him that what Goodchild property on the sou the north; and the evidence o him the lot he bought "only w are independent witnesses in no action, and their evidence is no the uncontradicted testimony c much to the same effect as that



Alfred J. Woods says that he did not want the plaintiff to know he was about to buy; and Davis bears this out when he refused during the negotiations to divulge the name of the proposed purchaser. Woods, however, in his attempt to shew that at the time the sale was closed he expected the purchaser to get part of the homestead property, says he measured the width of it about 1.30 p.m. on January 11th.

Plaintiff's evidence is that he saw Woods measuring it on the afternoon of January 14th, after the sale had been completed. It does not seem reasonable that if Woods was trying to conceal from plaintiff that he or defendants were prospective purchasers, he would be seen on the ground making measurements at the time when he was endeavouring to conceal the identity of the parties with whom plaintiff was dealing. I accept the evidence of plaintiff on this point rather than that of Woods.

The evidence, at the trial, of both Alfred J. Woods and defendant Mabel S. B. Woods was, on some matters, at variance with their testimony given previously. I was not favourably impressed with the evidence of Alfred J. Woods, and I accept the evidence of plaintiff and Davis in preference to his, where his evidence conflicts with theirs.

It was not until the time that the surveyor entered on the homestead property in April, 1911, that plaintiff became aware that defendants were putting forward any claim to any part of the homestead property; nor is there anything to shew that prior to that time the defendants laid claim to any part of the property north of the south limit of the barn and the boundary line between the two properties, as shewn on the ground. The mention of the "old town line," in the conveyance did not mean anything to the plaintiff or to the other parties concerned, for it is quite clear from the evidence of the plaintiff himself and of a number of reputable persons who have lived in the locality for various terms up to sixty years and more, that a line called "the town line" was unknown thereabouts.

It was attempted to be shewn by the defendants that Davis was the solicitor for and representative of the plaintiff in this transaction. In this they have utterly failed. Davis was employed by Alfred J. Woods to approach plaintiff with a view to purchasing. At the request of the defendants, and

it without any doubt as to its correctness, is, that the deed from plaintiff to defendant Woods, does not embody the true description of the property intended by the parties to be dealt with. The evidence convinces me, and I find, that what the purchaser, through her husband and Davis, asked to purchase, and what plaintiff intended to sell, and offered to sell for \$3,500, and what the purchaser intended to purchase for that price, and what defendant Sophronia Beresford intended as security for the money advanced to her co-defendant, was the property shewn on the ground as the lumberyard property, the northerly boundary of which is the line of the south wall of the barn on plaintiff's homestead property and its continuation westerly to the river.

There will, therefore, be judgment declaring that the northerly boundary of the land intended to be sold and purchased, and intended to be mortgaged to defendant Beresford, is the south line of the barn and its continuation westerly to the river, that the conveyance from the plaintiff to defendant, Mabel S. B. Woods, be reformed so as to carry this into effect, and that the mortgage from the defendant, Mabel S. B. Woods, to her co-defendant, be likewise reformed. The injunction restraining defendant Mabel S. B. Woods, her servants, workmen and agents from entering on or trespassing upon or interfering with plaintiff's property north of that line, is made perpetual; the other defendant is likewise restrained. Plaintiff is entitled to his costs of action.

COURT OF APPEAL.

APRIL 29TH, 1912.

SLINGSBY v. TORONTO R.W. CO.

3 O. W. N. 1161.

Negligence—Street Railway—Person Killed Crossing Tracks—Contributory Negligence—Evidence—Findings of Jury.

Plaintiff's husband, while riding on a bicycle, was struck by defendants' car, at an intersection, and killed. The intersection was a stopping-place for eastbound cars and there was at least one intending passenger at the intersection awaiting the car, yet it did not stop, but continued on its way at a high rate of speed. Action was brought by the widow on behalf of herself and children to recover \$15,000 damages for death of her husband.

Managers C. I. C. B. at the trial directed verdict to be entered

The appeal was heard by HON. SIR CHARLES MOSS, C.J.O.,
HON. MR. JUSTICE GARROW, HON. MR. JUSTICE MACLAREN,
HON. MR. JUSTICE MEREDITH, and HON. MR. JUSTICE MAGEE.

D. L. McCarthy, K.C., for the defendants, appellants.

W. D. McPherson, K.C., for the plaintiffs, respondent.

HON. SIR CHARLES MOSS, C.J.O.:—The jury found that
the car which struck the deceased was running at an exces-
sive rate of speed and it is conceded that there is evidence
upon which they could reasonably arrive at that conclusion.

The question is thus narrowed down to whether the de-
ceased so conducted himself as to cause the accident which it
is argued he might have avoided had he exercised reason-
able care. The jury have absolved him from the charge of
negligence.

There is, undoubtedly, much room for argument against
this conclusion, but it cannot be said that it is wholly with-
out support from the evidence.

It appears that at or near the south-west corner of Col-
lege and Shaw streets, there is a white post, indicating a
place at which cars stop to let down and take up passengers,
at which, at the time in question, there was at least one, if
not more than one person standing evidently intending to
board the car when it came to a standstill. As the car ap-
proached Shaw street, from the west, the brake was applied
and the car's speed was slackened to some extent, but as it
turned out, not with the intention of stopping for passengers.

It was allowed to proceed at a high rate of speed and the
deceased, who had come upon the crossing, was struck.

The condition of the roadway and the planking at the
crossing evidently demanded the deceased's close attention
at the moment, and may have prevented him from observing
that the car had not stopped as its earlier actions might, not
unreasonably, appear to the deceased to indicate. He ap-
parently did not discover that it was coming on until he had
reached the rail, and he then made an ineffectual effort to
clear the car.

It was for the jury to say whether, under all the circum-
stances, it was reasonable for him to conclude that the car

would stop or had stopped and that there was ample time for him to cross, or whether he deliberately took his chance of getting safely across before the car reached him.

Upon this their finding is adverse to the defendant's contention, and it cannot be said that there is not evidence upon which they could reasonably come to that conclusion.

The appeal must be dismissed.

HON. MR. JUSTICE MEREDITH:—If the rule of the defendants requiring their motorman to reduce the speed of cars, and to keep them carefully under control, when approaching crossings and crowded places where there is a possibility of accidents—only a reasonable, if not really a necessary, precaution—had been observed, this unfortunate accident would not have happened; and so the finding of negligence in the running of the car at too great a speed at the time of the occurrence, is not now called in question; but, it is said, that it was the negligence of the unfortunate man, who was killed in the collision, which caused the accident; or, at least, that he was guilty of contributory negligence.

There is much to be said in favour of these contentions; but they involve only questions of fact proper for the consideration of the jury; and the jury have unequivocally found against the defendants on these very questions, very fully and clearly presented to them at the trial.

It can hardly be said that reasonable men could not find that the negligence of the defendants, before mentioned, was the proximate cause of the injury and loss complained of by the plaintiff in this action; there is more to be said in the defendants' favour upon the other point.

Concise and captivating logic such as that the unfortunate man either saw the car approaching and was guilty of negligence in attempting to cross in the face of it, or failed to see it and was guilty of negligence in that failure, does not cover the whole circumstances of such a case as this; the place where the accident happened was a level crossing of a much used highway; it was the duty of the motorman, under the rules of the defendants, to have reduced speed and kept his car carefully under control when approaching such a place; immediately west of it was a regular stopping place for all the cars for letting down and taking up passengers, and there were persons there waiting to be taken up; and the highway at the place in question was being renewed and

was in such a condition that the attending over, especially on a bicycle, as necessarily be taken up, in picking his greater extent than would have been been in its ordinary state, and that employers knew. These were all very affecting the question, what would rarely do in such a case?

Under all the circumstances of the also, in my opinion, one for the jury; stand, whether in very truth right or

DIVISIONAL COURT

PUKULSKI v. JARDINE Et A.
JARDINE Et A.

3 O. W. N. 1172.

Company—Liability of Directors for Wages Act, s. 94—Unsatisfied Execution after Winding-up Proceedings under D

Appeal from judgment of Denton, J., in actions under Ontario Companies Act, directors of Boyd-Gordon Mining Co., for wages earned by them as "servants, laborers" of the company, and in respect of which execution had been returned unsatisfied. Cross-appeal in respect of costs of a second writ of execution.

DIVISIONAL COURT held, that in order to maintain the statutory action, the return of the writ required diligent efforts to locate assets, and cannot be made out by the company.

Grills v. Farah, 21 O. L. R. 457, disapproved.

That an execution sent to the sheriff at the head office of the company was situate in the county of York.

Brice v. Munro, 12 A. R. 453, followed.

That the fact that an order had been made against the company under Dominion Winding-up Act, and that the company received the writ of execution, but before execution thereto, does not prevent him from making a return.

That plaintiffs, having been allowed execution to the sheriff at Toronto, where the company was situate, could not be allowed to return a writ to the sheriff of Nipissing, where the execution was carried on.

Marquis of Salisbury v. Ray, 8 C. B. 413, and *Ex p. Cuddeford*, 20 Q. B. D. 316, followed.

Appeal and cross-appeal dismissed, costs of appellants, less \$5, fixed as costs of cross-appeal.

appeals by the defendants from a judgment of His Honour Judge Denton, of York County Court, in favour of plaintiffs in actions under Ontario Companies Act, sec. 94, to recover from defendants, directors of the Boyd-Gordon Mining Co., Ltd., sums due plaintiffs respectively for wages as workmen employed by said company. Plaintiffs had recovered unsatisfied judgments against the company. Plaintiffs cross-appealed in respect of the costs of the execution issued against the company.

The appeals and cross-appeals were heard by Hon. Sir John Boyd, C., Hon. Mr. Justice Latchford, and Hon. Mr. Justice Middleton.

E. B. Ryckman, K.C., for the defendants.

J. P. Macgregor, for the plaintiffs.

Hon. Sir John Boyd, C.:—The liability of the directors of a company to pay one year's wages of the labourers and servants thereof for services performed while they were directors, requires, as a preliminary requisite, that an execution against the company is to be returned unsatisfied in whole or in part. This is the same form of words which has frequently been the subject of judicial exposition in various company Acts in respect to creditors and shareholders, *e.g.*, the Railway Act, C. S. C. (1859), ch. 66, sec. 80. The conclusion not now to be controverted is that it is enough to satisfy the statute if a *bona fide* attempt has been made to collect the amount of the judgment from the company, and that a *bona fide* return has been made that there is nothing in the shape of assets of the company to satisfy it: *Brice v. Munro*, 12 A. R., pp. 464 and 468. It is also sufficient if the writ of execution be directed to the sheriff of the county where the venue is laid, or the county where the head office of the company is situated, and it be duly returned by him that the company had not any goods or chattels in his bailiwick: *Nixon v. Brownlow*, 1 H. & N. 406; *Jenkins v. Wilcock*, 11 C. P. 505 (1862). The writ having been issued to the sheriff, he is bound to return it, and it is not shewn that the return in this case is untrue. On the contrary, it appears that he has done all that the law requires. As expressed by Willes, J., in *Ilfracomb v. Dean*, L. R. 2 C. P. 18, it must be shewn that "reasonable efforts have been made to discover property of the company which could be made

available to satisfy the judgment," actively established. The proceedings the winding-up of the company began were neither formal, illusory, or fraudulent for the purposes of, if possible, obtaining judgment, and not merely to give action against the directors. The plaintiff is satisfied, because no effects could be obtained by the plaintiffs under it. The tests suggested in *Land*, 5 C. P. 458, and *Jenkins v. ...* have been complied with, and in this case is very different from *Grills v. Fan* where a merely formal return of *nulla* was procured by the plaintiff himself.

The winding-up order effectually seizes assets, whether goods or lands, from the defendant's execution, but it does not otherwise interfere with the plaintiffs to proceed against the directors of the claims which could not be covered by the coverable goods or chattels up to the time of the winding-up.

The remedy of servants to prefer a claim in the winding-up is limited to three months (1906), ch. 144, sec. 60), but they are not to or wait for some possible relief to the Dominion Statute; they may well rely on the provisions of the Ontario *Insolvent Act*, *Sligo*, 4 E. & B. 120, and *Palmer v. ...* 1015.

It is argued that the prohibitions of the Act forbid the acts of the sheriff in making a return as he had previously done, because of the writ issued on September 29th, 1911—his return being made on September 29th, 1911. The writ issued and was received on the 12th September, and he could not have seized up to the 29th September, and the return which is communicated by his return is a proceeding against the insolvent company in violation of the Act.

Sections 22 and 23 are to be read in their true scope. Section 22 enacts that where a winding-up order is made no suit, action, or other proceeding with or commenced against the company without the leave of the Court and subject to the conditions the Court imposes.

the company and that, therefore, the returns to the executions made after the winding-up are null and void.

The question so raised is of importance, as, if the defendant's argument is well founded, the effect of the winding-up order is to materially diminish the right of wage-earners and the liability of directors; because, under the Ontario Statute, the directors are liable to the extent of one year's wages, while under the Dominion Winding-up Act, the wage-earner is only entitled to a preference for his unpaid wages not exceeding the arrears which have accrued during the three months next previous to the date of the winding-up order. R. S. C. ch. 144, sec. 70. The question is also of importance, because in many cases the entire assets of the company in liquidation are taken by debenture holders; and if the contention is well founded, the directors, by reason of the winding-up order, may altogether escape this statutory liability.

Before considering the validity of this argument and the other questions raised, it is desirable to set out the facts proved at the trial, at length:

The Boyd-Gordon Mining Company has its head office at Toronto. It conducted mining operations in the District of Nipissing. On the 11th September, 1911, Pukulski recovered judgment against the company for \$157.06, wages earned during the months of June, July and August, 1911, and \$22.04 taxed costs, in addition to the costs of execution. Upon the same day, writs of execution against goods and lands were issued to the sheriff of Toronto, and on the following day these were placed in the hands of the sheriff for execution. Contemporaneously an execution was issued directed to the sheriff of Nipissing. This was placed in the hands of that sheriff on the 15th September.

On the 16th of September, the company made an assignment for the benefit of its creditors, and on the 29th September, an order was made for the winding up of the company under the Dominion Act.

In order that the conditions precedent, prescribed by the statute, might be complied with, the plaintiff's solicitor requested the sheriffs to return these writs of execution, and they were respectively returned, unsatisfied. The endorsement upon the writ to the sheriff of Toronto was: "*Nulla bona*. The answer of Fred Mowat, sheriff." The return upon the Nipissing writ was: "Returned unsatisfied. H.

winding-up supersedes the executions and prevents the creditor from further prosecuting his execution against the assets of the company. The sheriff would then be justified in returning the execution unsatisfied. He is not by the Ontario Act required to make a return "*nulla bona*," and I think it would be sufficient if he made a special return, stating, "I returned the writ unsatisfied, because I am unable to take the assets of the company within my bailiwick in execution, by reason of the making of an order under the Dominion Winding-up Act for the winding-up of the company." This cannot be regarded as a "proceeding with the writ against the company," which is the thing prohibited by the statute. The Ontario Statute, which imposes this liability upon the directors of the company, seeks to protect them from vexatious proceedings while the company has assets to which the creditor may resort. As soon as these assets are withdrawn from and rendered unavailable to the process of the wage-earner, and the sheriff certifies that there are no assets which he can take, the obstacle is removed, and the wage-earner is free to enforce his remedy.

It is argued that the plaintiff has not proved that the defendants are directors of the company. He has put in a certified copy of the last Government return, which shews that the defendants were then directors; and he has produced the minute book of the company from the custody of the liquidator, these minutes shewing that the directorate has not since been changed. This appears to be sufficient.

Two minor questions were argued before us. It was said that an allowance for travelling expenses did not come within the statute. We thought it did. Then the plaintiff complained that he had not been allowed the costs of the second writ of execution, and cross-appealed with reference to it. We think the Judge was right in disallowing these. See *Marquis of Salisbury v. Ray*, 8 C. B. N. S. 193; and *Re Long, Ex p. Cuddeford*, 20 Q. B. D. 316.

Both appeals should be dismissed. The defendants should pay the costs, less five dollars allowed in respect of the cross-appeal.

The facts in the *Perryman Case* are substantially similar, and the same order will be made in it.

HON. MR. JUSTICE LATCHFORD, I agree.

HON. MR. JUSTICE BRITTON.

APRIL 29TH, 1912.

PEACOCK v. CRANE.

3 O. W. N. 1184.

Principal and Agent—Sale of Mine—Secret Profit by Agent—Fraud—Price Enhanced—Right of Purchasers as against Agent to Recover Amount over Actual Price.

Actions to determine the ownership of \$50,000 and interest, paid into Court by vendors of Silver Cliff Mine. The latter procured defendant Moore, who was the representative of defendants Crane and Cotton, to undertake the sale of the mine for \$500,000, of which \$25,000 commission was to be paid to Moore. Moore associated with him defendant Jeffery and defendant Eames, who was private secretary of plaintiff Peacock, and an arrangement was made with the vendors that the nominal price should be raised to \$550,000, and that defendants Moore, Jeffery and Eames should endeavour to sell the mine to plaintiffs at this sum, of which they were to receive, if successful, \$50,000, in addition to the commission of \$25,000. The sale was made to plaintiffs for \$550,000, but before the vendors paid over the \$50,000, it was claimed by defendant Crane, and later by plaintiffs, who had discovered the real facts of the sale. The vendors applied and obtained an order allowing them to pay the \$50,000 into Court, which was done.

BRITTON, J., *held*, that defendants Moore, Jeffery and Eames had been guilty of fraud on plaintiffs, and their principals, defendants Crane and Cotton, stood in no higher legal position as a result thereof.

Myerscough v. Merrill, 12 O. W. R. 390, and *M. & N.-W. L. Co. v. Davidson*, 34 S. C. R. 225, referred to.

Judgment declaring plaintiffs entitled to fund in Court, costs of issue and trial thereof, to be paid by defendants, other than Moore and Jeffery, who had admitted plaintiff's claim by their defence.

An issue directed by an order tried at Toronto without a jury.

M. K. Cowan, K.C., and G. H. Sedgewith, for the plaintiffs.

I. F. Hellmuth, K.C., and G. B. Balfour, for the defendants, Crane and Cotton.

HON. MR. JUSTICE BRITTON:—This is an action to determine whether the plaintiffs or any of them, or the defendants, or any of them, were, are, or is entitled to the sum of \$50,000, and interest, paid into Court under the following circumstances.

Rinaldo McConnell, I. E. H. Barnett, I. W. Hennessy, and H. S. Hennessy, prior to the 12th June, 1909, were the owners of certain mining property called the Silver Cliff Mine, situate in the Cobalt Mining District, which property they desired to sell for the price of \$500,000. These owners,

after considerable negotiation, promised to pay to the defendant, John I. Moore, a commission of \$25,000, should Moore sell this property for the owners at the price named. The defendant, Jeffrey, was associated with Moore — although Moore was acting in his own name. Moore and Jeffrey became acquainted with the defendant Albert H. Eames, who was the private secretary of the plaintiff A. B. Peacock, and they, Moore, Jeffrey and Eames, formed the plan of selling the Silver Cliff Mine to the plaintiffs. Moore then saw the owners of the property and stipulated for a larger commission than \$25,000. The owners refused to pay any longer sum. Moore then suggested that the owners should call the price \$550,000, upon the distinct understanding and agreement that only \$500,000 should be paid to them, and that out of this sum of \$500,000, a commission of \$25,000 would be paid. Passing over details of the negotiation, an agreement was arrived at, between Moore and the owners, that Moore should have authority to sell the mine at \$550,000 upon terms and conditions fully set out. This authority was limited to negotiating a sale to the plaintiffs, upon the terms mentioned, and the authority was limited in time to the 12th June, 1909. It was agreed that in the event of a sale, the owners would pay a commission out of the proceeds of the sale from time to time as received, as follows:

On payment of 2nd instalment of purchase money,	\$4,411.75
On payment of 3rd instalment of purchase money,	2,941.20
On payment of 4th instalment of purchase money,	5,882.35
And on last payment	11,764.70

Making the sum of\$25,000.00
which the owners were to pay out of the purchase price they were willing to accept; but the owners further agreed that upon payment to them of the whole sum of \$550,000, \$50,000, out of that sum should be paid to Moore by way of additional commission. Eames represented to the plaintiffs, to the knowledge of Moore and Jeffery, and with their consent if not at their suggestion, that the actual purchase price of this mine was \$550,000, and the plaintiffs had no notice or knowledge of the secret arrangement between the vendor and Eames, Jeffery and Moore, until after the completion of the purchase by them, and the payment over of the purchase money.

vendors, 6 and 7 of that order deals with matters of fact, then (5) That, without the issue of any new writ, the said Peacock, Clemson, and Dinkey, shall proceed to the trial of an issue in which they shall be plaintiffs, and the plaintiffs in that action, namely, Crane, Otis, Morse, Bruce, and Cotton, and Moore, Jeffrey, and Eames, shall be defendants, to determine whether the plaintiffs in said issue, or some or one of them, or the defendants in said issue, or some or one of them, are or is entitled to the money to be paid into Court.

Then followed directions as to proceedings which should be taken for the trial of that issue.

The money was paid into Court.

The plaintiffs delivered their statement of claim pursuant to the directions contained in the order mentioned.

The defendants, Jeffrey and Moore, in their statement of defence, expressly admit: (1) That the purchase price of the mining property in question was \$500,000, and that the sum of \$50,000 was added to the same in order to provide for payment of a further \$50,000 commission to the defendant Eames; (2) That they have satisfied themselves that the sum of \$50,000 was improperly added to the true purchase price, without the consent or knowledge of the plaintiffs, and these defendants make no claim as against the plaintiffs to the money standing in Court in this matter. The defendant Eames, by his solicitors, filed a statement of defence, simply denying all allegations in the statement of claim.

He did not appear at the trial. He resides at Pittsburgh, in the State of Pennsylvania, and, according to the evidence of the plaintiff, Peacock is a defaulter to a large amount as to money of Peacock.

The defendants Crane, Otis, Morse, Bruce, and Cotton, in their statement of defence, allege that the defendant Moore was their agent and instructed by them to endeavour to effect a sale of Silver Cliff Mine, property to the plaintiffs. They allege a *bona fide* sale by Moore to the plaintiffs through Eames, the agent of plaintiffs, and that plaintiffs now hold the \$25,000 part of the commission in trust for Moore, and desire to get the \$50,000 for the purpose of benefiting themselves and Moore and in fraud of these defendants.

Upon the evidence, the allegations in plaintiff's statement of claim are substantially established. Angus W.

Fraser was the solicitor for the owners of the mine, and acted for them in the transactions now under consideration. An option had been given to the defendant Otis to purchase; negotiations for this had been carried on by the defendant Moore. This option expired—the owners would not renew it. Then negotiations commenced between Mr. Fraser, acting for the owners, and Moore and Jeffery. About the 27th May, 1909, Moore made it plain that he had interested these plaintiffs—or Peacock, one of the plaintiffs, in this property, and as possible purchasers or a possible purchaser of it. It is quite clear that Moore's dealings were with Eames, the trusted private secretary of Peacock.

The scheme was devised as between Moore and Eames to have the nominal price changed from \$500,000 to \$550,000, with the object of getting \$75,000 for themselves instead of only \$25,000, which the owners were willing to pay in case the sale was made at their price of \$500,000.

The only inference that can be drawn from the clear and undisputed evidence is that Moore and Eames, or Moore, Jeffery, and Eames, connived so that Eames would get, either for himself or for himself and the others, the additional \$50,000, of the money of the plaintiffs. This was called commission. It was a secret commission. The knowledge of it was kept from the knowledge of the plaintiffs. The transaction would be bad enough, very bad, if paid by the vendors out of their own money to the agent of the purchasers, but what can be said in support of it by anyone, when by arrangement between the vendors and their agents, and the agent of the purchasers, a scheme was devised to get an additional large commission out of the purchasers.

The story is bluntly told by Eames in his letter of 7th June, 1909, to the plaintiff Dinkey, (Ex. III.). Eames, after explaining the situation, as the first payment, says: "If you care to go along one-fifth interest will cost \$15,000, plus about \$2,000 for working capital. This is \$5,000 more than we talked about. However, the owners had an offer of \$550,000 spot cash which they would have accepted if they had not given this option to Mr. Moore, so, do not think there is any use in trying to do better." This was a deliberate falsehood. Not a particle of evidence that the vendors

The evidence of defendant Crane established that the defendants Otis, Morse, and Bruce, have no right to any part of this money. The only claimants, therefore, against the plaintiffs, are Crane and Cotton, and they claim only because, as they allege, Moore and Jeffery were, or Moore was, their agents or agent. Crane and Cotton cannot claim money paid over through the fraud of their own agents. In so far as these agents, by fraud, assisted Eames in getting money from the plaintiffs, the defendants, as principals, are in no better position than the agents themselves. There was a fraud upon the plaintiffs. The rights of Crane and Cotton are no higher than the rights of Moore or Jeffery or Eames. In any view of the case, whatever rights, if any, Crane and Cotton can have to commission it can only be, as to the \$25,000, or part of it. That sum was paid over by vendors. That money is not in Court. This issue is as to the \$50,000 obtained from the plaintiffs by calling it part of purchase money, but intending to get it calling it commission. The rights of Crane and Cotton, if any, against the vendors, are reserved by the order. This issue is not as to the \$25,000 or any part of it, but only as to the \$50,000, which never belonged to vendors. I find that the plaintiffs, A. R. Peacock, D. M. Clemson, and A. C. Dinkey, are entitled to the said money paid into Court, under the order of the Master in Chambers, dated the 21st day of February, 1910, namely, the \$50,000 and interest thereon, less the costs deducted thereout, and also interest allowed by the Court upon said money so paid in, and I find that the defendants, namely, A. F. Crane, Theodore E. Otis, Bryan K. Morse, F. G. Bruce, George A. Cotton, John I. Moore, W. H. Jeffery, and Albert H. Eames, are not, nor is any one of them entitled to said money or any part of it. Pursuant to the order above mentioned, I order and direct that the costs of said issue and the trial thereof, shall be paid by the defendants, other than the defendants John I. Moore and W. H. Jeffery, in the said issue, to the plaintiffs in said issue. No costs to be paid to or by the defendants Moore and Jeffery.

MCMURTRY v. LEUSHNER.

3 O. W. N. 1176.

*Mortgage—Covenant—Action to Recover on—Third Party Added—
Relief Over.*

Action on covenant in mortgage by mortgagee against original mortgagor, Leushner. The latter added as third party one Campbell, to whom he had sold the lands embraced in the mortgage. Campbell agreeing in the purchase-agreement to assume liability on the covenant and to indemnify Leushner in respect thereof. Campbell admitted liability, but claimed execution should not issue until Leushner had paid the judgment against him.

CLUTE, J., gave judgment in favour of plaintiff against Leushner with costs, and in favour of Leushner against Campbell with costs.

Boyd v. Robinson, 20 O. R. 404, and other cases, followed.

Action to recover upon a covenant in a mortgage.

Frank McCarthy, for the plaintiff.

J. S. Fullerton, K.C., for Leushner.

The pleadings were noted as against Thompson, Ballantyne and Campbell.

Before the close of the case, Campbell was represented by F. H. Thompson, K.C.

HON. MR. JUSTICE CLUTE:—The action is brought by the plaintiff as mortgagee and asks for judgment against the

stated to be subject to the mortgage in bell covenants to assume the incumbrance pursuant to the agreement, it is stayed is subject to the mortgage in bell "assumes, covenants and agrees that same becomes due and payable, and agrees to save harmless the said party all loss, costs and damages that may arise with." This is a covenant of indemnity. Leushner is entitled to judgment for the amount obtained against him and his co-defendants. *Boyd v. Robinson*, 20 O. R. 404; *Brit v. Tear*, 23 O. R. 664; *English & Flatau*, 36 W. R. 238; *Clendennan v. Newburn v. McKelcan*, 19 A. R. 729.

Judgment will, therefore, go against the defendant for debt and costs, but he should have no judgment for foreclosure.

HON. MR. JUSTICE RIDDELL.

DE LA RONDE v. OTTAWA POLICE
ASSOCIATION

3 O. W. N. 1188.

*Insurance—Police Benefit Society—Action
By-laws of Association—Plaintiff Forecloses
Force—Right to Pension.*

Action by plaintiff, formerly Chief of Police, to recover \$1,000 retiring allowance under pension fund. In February, 1910, the Board of Police resigned. One of the draft by-laws of the Association provided that no member should be entitled to retire who was not capable of performing his duties.

RIDDELL, J., *held*, that the above by-law was validly passed by the Association, but in any case it had no effect as to the plaintiff's right of involuntary resignation.

Judgment reserved further in hope of a settlement.

A. E. Fripp, K.C., for the plaintiff.

M. J. Gorman, K.C., for the defendant.

HON. MR. JUSTICE RIDDELL:—The plaintiff is a member of the Police, Ottawa, and in 1905, largely on account of the members of the Police Force and

ordered by the Board of Directors and subject to the Board of Commissioners of Police, subject in case of differences to the result as stated in section 10."

"18. So far as the funds of the Association will provide . . . the following scale of benefits at retirement and death, respectively, shall be paid to members of the Association in good standing (or their representatives . . .) who are not in arrears for dues or other authorized assessments towards the benefit fund:—

(A scale is set out.)

A clause, No. 19, was introduced to cover the case of the plaintiff, then the Chief.

"19. Any member who joined the Police Force previous to the first day of March, 1905, and who, at that date, had attained the age of 50 years, shall, upon retiring, be entitled to one month's pay (as at date of such retirement) for each year of service, but shall in no such case receive more than the sum of \$1,000."

Other provisions are:

"24. Any member who is compelled to resign by reason of illness, shall have his case considered by the Board of Trustees, subject to the approval of the Board of Commissioners of Police."

"26. Any member of the Association who may be dismissed from the Police Force for cause, by the Board of Police Commissioners, shall immediately thereupon cease to have any interest in the fund of the Association, and shall not be entitled to any gratuity or benefit therefrom."

These were adopted, perhaps informally, but, nevertheless, adopted in fact by a meeting of the Force in December, 1909, except the last clause in sec. 10, which was objected to and not adopted.

In 1910, the plaintiff was asked for his resignation and he refused, the Board of Commissioners sent their secretary to see him and force him to resign "no compulsion, but you must," and the plaintiff did resign. The Board accepted his resignation and spread in their minutes a fulsome commendation of the resigning Chief (22nd February, 1910).

In March, 1910, at a meeting of the trustees of the fund, it was moved, seconded and carried to strike out the words "but in no case shall a member be entitled to retire who is

in good health and capable of performing his duties from sec. 10. I think this was wholly unnecessary, as that clause had not in fact been adopted at any time. This resolution was approved by the Board of Commissioners of Police in May, 1910. I cannot see that either the Board of Trustees of the fund or the Board of Commissioners of Police had any power in the premises; the by-laws, etc., are to be made by the members, not the trustees, and the Commissioners are not mentioned in the application.

In September, 1910, the plaintiff applied for an allowance of \$1,000 under sec. 19—this was considered by the Board of Trustees and “they regretfully came to the conclusion that they could not recommend him for a retiring allowance under the rules and regulations governing the benefit fund at the time of his leaving the Force. In this judgment the Board of Commissioners of Police concurred. In April, 1911, a demand was again made and the Board of Trustees, at a meeting, decided that “under the by-laws, Major de la Ronde is not entitled to a retiring allowance.” This action was then brought.

It would seem that the Boards were, in deciding upon the application, of the impression that the last part of sec. 10 was in force. This is an error; this clause never was adopted, and I shall so declare. Even were it in force, the plaintiff does not come within its provisions—he did not claim the right to retire—he was forced out—the clause never was intended to cover such a case—nor does sec. 26 apply.

I do not, at present, give judgment; I retain the case in the hope that with the above findings, the parties will be able to agree. If not, I shall give judgment.

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ONTARIO WEEKLY

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TORONTO, JUNE

MASTER IN CHAMBERS.

BROOM v. TOWN OF TORONTO

3 O. W. N. 11

*Parties — Adding — Motion to Dismiss —
Limitation of Action*

Motion by plaintiff to have A. A. Anderson, solicitor for the defendants, added as

Plaintiff in person for the motion.
W. A. McMaster shewed cause.

CARTWRIGHT, K.C., MASTER:—
which this action arose took place in 1908. Mr. Anderson was solicitor for the town, and acted for them in the matter.

On 1st October, 1908, the town made a full settlement of all matters in question with the town and the action was then discontinued against that corporation.

It is now alleged by plaintiff in support of the motion that he has since discovered that questions were handed over by Anderson to the R. W. Co. (against whom the action was brought) in a loose and unsafe condition for the sale of them from the municipal storehouse at Junction, where they had been stored. The mayor of said town."

It does not appear how this motion could be joined with the existing motion, as a cause of action existed in August 1908.

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could be the new action (as it would then be) would not have arisen within six years.

It would, therefore seem under the decision in *Clarke v. Bartram*, 21 O. W. R. 259; 3 O. W. N. 691—the order should not be made “when this would result in an improper joinder.”

The plaintiff was allowed to file an affidavit in reply to that of Mr. Anderson. This only makes it clearer that any action against Anderson would be against him personally. This being so the motion must be dismissed with costs if asked for.

Affirmed by Hon. Mr. Justice Middleton, 22 O. W. R. 41.

DIVISIONAL COURT.

MAY 6TH, 1912.

GALLAGHER v. ONTARIO SEWER PIPE CO.

3 O. W. N. 1240.

Action — Dismissal — Action brought before Termination of Agreement—To Take Sewer Pipe Clay from Land—Right of Action had not Accrued.

Appeal by the plaintiff from a judgment of HON. MR. JUSTICE TEETZEL, 21 O. W. R. 550, was heard in Divisional Court by HON. SIR WM. MULLOCK, C.J.Ex.D., HON. MR. JUSTICE CLUTE, and HON. MR. JUSTICE RIDDELL, and dismissed with costs.

C. W. Bell, for the plaintiff, appellant.

J. A. Macintosh, for the defendant, respondent

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Contract —
Claims
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Joinder of causes—Action for alimony against husband — Action against husband and his father for custody of children—Habeas corpus. *Ney v. Ney* (No. 2), 524.

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3. COURT OF APPEAL.
4. DIVISIONAL COURT.

1. PRIVY COUNCIL.

Effect of giving security for costs of appeal—Security not given as required by Con. Rule 832 (d)—Stay of execution — Privy Council Appeals Act,



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Legacy of annuity — Predecease of legatee — Failure of gift — Annuity during lifetime of widow — Death of annuitant after testator but before widow — Right of personal representatives — Specific legacy of \$500 — Vested gift — Substitutionary gift to children of legatee — Predecease of legatee — "Children" of legatees — Rights of grandchildren. *Denton, Re*, 954.

Motion for by executors under Con. Rule 938 — Wills Act, s. 26 (1) — Will speaking from death — Legacies payable out of specific fund which was destroyed during testator's life — Direction to sell lands and divide proceeds among named persons — Land sold during testator's life — Administration of estate — Debts and costs payable out of particular fund — Costs of all parties out of estate. *Atkins, Re*, 238.

Motion for under Con. Rule 938 — Legacy of annuity — Legatee predeceased testator — Gift of annuity failed — Bequest of annuity during lifetime of widow — Death of annuitant after testator's death, but before widow's — Personal representative entitled — Specific legacy of \$500 — Vested gift — Children of legatee entitled to gift — Legatee predeceased

— Costs of all parties out of estate. *Denton, Re*, 352, 360.

Motion for under Con. Rule 938 — Division of residue — Maintenance of children — Sale of residence — Costs. *Corkett Estate, Re George*, 468.

Motion for under Con. Rule 938 — Postponement of time for payment of legacy — Death of legatee before payment — Vested legacy — Residuary clause. *Hay, Re*, 546.

Motion under Con. Rule 938 — Maintenance of widow — Death of widow — Corpus of estate — Income — Debts — Religious society — Identification — Residuary clause is nugatory — Nothing left undisposed of — Funeral expenses not maintenance. *Swayzie, Re*, 95.

Motion under Con. Rule 938 by assignee for benefit of creditors of beneficiary — Direct devise — Devise in trust — Implication — Modification — "On the death of any of said sons or daughters or upon the termination of their interest in the said property" — Administration of estate — Assignee given his costs out of estate coming to assignor beneficiary — Otherwise no costs. *Jones, Re*, 272.

Originating notice — Hypothetical questions. *Galbreath, Re*, 446.

Originating notice — Motion for — Trusts — Agreement between husband and wife to live apart — Payments to be made by husband to wife — Debentures assigned to trustee for securing payments — Gift by testator of several annuities — No indication that testator intended the corpus of the estate to be encroached upon — Annuities out of income only — To be paid in priority — To be dealt with annually — No annuitant who failed to receive full amount has any claim against the income for any succeeding year — Surplus of income for any year may be used in payment of arrears during lean years. *Irwin, Re*, 562.

Residuary clause — Division of residue among children in proportion to legacies — Alterations in amounts by codicil — Second codicil — Intention — Extent of rule. *Hunter, Re*, 5.

Trust infringing rule against perpetuities. *Kennedy v. Kennedy*, 501.

Trusts — Charitable — Creation of bishopric — Contingency — If happens — Valid transfer to another charity — After 25 years — Rule against perpetuities — Effect of will. *Mountain Will, Re*, 866.





